No. 1189 Sup. 180.

Br. of Turner & Johnson for Pet

Supreme Court of the United States.

Filed Oct. 24, 1900.

October Term, 1900.

THE FARMERS' LOAN AND TRUST COMPANY, Trustee,

Petitioner,

vs.

THE PENN PLATE GLASS COMPANY and WILLIAM L. KANN,

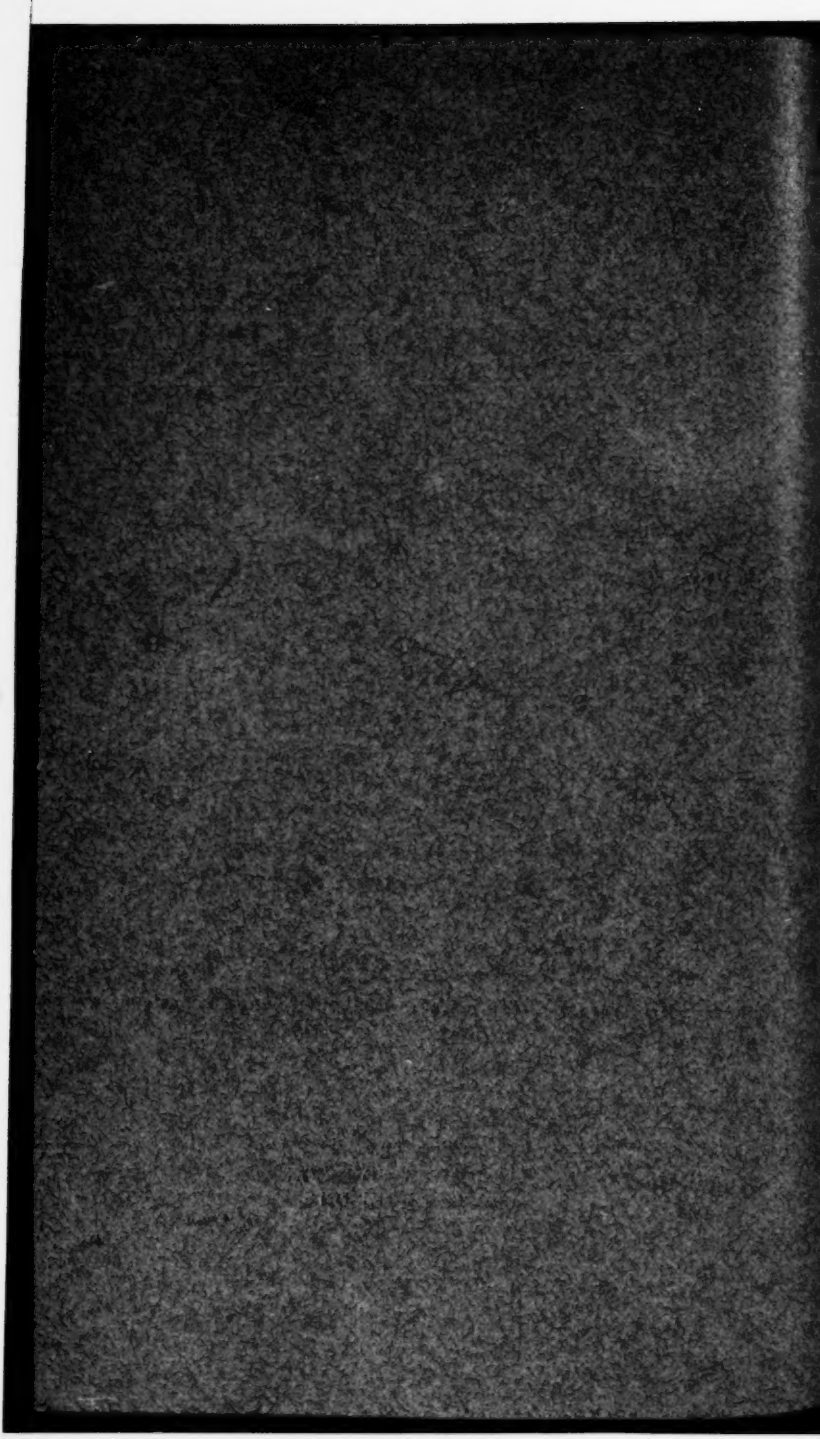
Respondents.

Brief for Petitioner

On Motion for Writ of Certiorari.

HERBERT B. TURNER,
JOHN G. JOHNSON,
J. G. FERGUSON,

Of Counsel.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

THE FARMERS' LOAN AND TRUST COMPANY,
Petitioner,

against

THE PENN PLATE GLASS COMPANY and WILLIAM L. KANN,
Respondents.

Brief for Petitioner for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

The Petitioner submits herewith, and as a part hereof, its brief as appellee in the Circuit Court of Appeals, simply prefixing to said brief the following suggestions:

The Petitioner, being the trustee under a mortgage made by a corporation to secure a series of bonds, filed a bill to foreclose said mortgage, the principal and interest being due. The suit was vigorously opposed in every way by able counsel representing the defendant corporation, which through assignment became the owner of the property, subject to the Petitioner's mortgage, and also representing the president of that corpor-

ation individually, he having, for reasons which will appear in the complaint, been made party defendant. In every possible way these parties opposed the Petitioner in obtaining a decree of foreclosure and sale, delaying the progress of the cause for more than a year by taking testimony and in other ways. At the beginning of the litigation, when a motion for a receiver was made by the complainant, the present Petitioner, these same parties successfully opposed the motion, although the principal of the mortgage debt had matured and several instalments of interest were due, and although they refused to insure the property for the benefit of the bondholders. That they were bound to effect such insurance, we insisted and they denied.

While the defendants were in possession of the property--left in possession by reason of the failure of the Court below to grant a receiver—the mortgaged property was almost entirely destroyed by fire. The defendant corporation, being the party in possession, had effected insurance to an amount more than equal to the *entire value* of the property.

The Petitioner insists that inasmuch as the motion for a receiver was denied by reason of the opposition of the parties defendant, and inasmuch as the Court below erred in such denial, the defendants should be regarded as receivers in possesssion, and the insurance which was effected should, so far as is necessary, be applied to the discharge of the mortgage debt.

There is an eminent justice in this. Any other course will simply enable these parties to profit very largely by their own wrong and themselves to collect the amount of the mortgage debt, and not pay it over to those to whom it is due. Had there been no fire, this amount of two hun-

dred and fifty thousand dollars indebtedness would still be charged upon this valuable and undestroyed property, property which the defendants admit was charged with the amount of the mortgage. The fire taking place, however, and the property being fully insured, these defendants, if the decree of the Court of Appeals is to be followed, will collect not only the value of their own interest in the property but also the value of the mortgage itself.

Evidently this cannot be law or equity, and it is certainly not justice. The Court should correct the error of the Court below in refusing the receivership, when it can do so now without any loss to the parties defendant.

The questions which arise in the discussion of this case are of gravity and importance. The very fact that the Circuit Court of Appeals, after hearing two counsel on each side and after holding the case for weeks, ordered a new argument of its own motion, is of itself quite sufficient to show the gravity and importance of the case. To this consideration may be added the fact that the bondholders are practically without remedy, and their security almost entirely, if not entirely, gone, unless the insurance moneys can be applied as their application was ordered by the decree of the Circuit Court, which decree has the approval of the opinion of one of the Judges of the Court of Appeals.

The brief submitted to the Court of Appeals, a copy of which is annexed, is very full, and it is not deemed necessary to add anything more on submitting this Petition.

HERBERT B. TURNER,
JOHN G. JOHNSON,
J. S. FERGUSON,
Solicitors and of Counsel for Petitioner.

Circuit Court of Appeals of the United States,

THIRD CIRCUIT.

THE FARMERS' LOAN AND TRUST COMPANY, Trustee, Appellee, *against* THE PENN PLATE GLASS COMPANY, Appellant, THE PENNSYLVANIA PLATE GLASS COMPANY, and WILLIAM L. KANN.	In Equity.

BRIEF FOR APPELLEE.

This is an appeal taken by the defendant, the Penn Plate Glass Company, from a decree of foreclosure and sale rendered by the Circuit Court of the United States for the Western District of Pennsylvania, in favor of the complainant, The Farmers' Loan and Trust Company, as Trustee, against the defendants.

Statement.

On January 1st, 1891, the Pennsylvania Plate Glass Company, a Pennsylvania corporation, made

a mortgage to The Farmers' Loan and Trust Company, a New York corporation, to foreclose which mortgage the original bill herein was filed. The mortgage covered the plant of the mortgagor company, being a specified tract of land in Irwin, Westmoreland County, Pennsylvania, with certain gas and water contracts, and all the company's other property, real or personal, then owned or thereafter to be acquired, including rents, issues and profits (Record, Vol. I, pp. 18–39).

This mortgage was given in trust to secure six per cent. bonds which were issued to the amount of $250,000 of principal.

On the 19th of March, 1894, a suit was brought in the Court of Common Pleas of Westmoreland County, at the instance of the directors, against the Pennsylvania Plate Glass Company to procure its judicial dissolution. In that suit Joseph W. Stoner was on that day appointed Receiver of the Company. An order was subsequently made for the sale of the property by the Receiver *subject to the lien of the existing mortgage for $250,000.* Accordingly, on the 18th of June, 1894, the Receiver sold the property so subject to the mortgage at public auction. The property, it will be noted, was not sold subject to any possible claim that might be proved to exist, but to this particular mortgage, for this specified amount of $250,000, fully described in the terms of sale. The defendant, W. L. Kann, was the purchaser, the price being $37,500. On July 2d, 1894, a deed was, by order of the Court, given by the Receiver to Kann. It distinctly and in accordance with the express terms of the order, recited that the conveyance was made "*subjected to a mortgage made by the said Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of the City of New York for two hundred and fifty thousand dollars ($250,000), dated Jan. 1, 1891, recorded in Westmoreland County in Mortgage Book 43, page 1.*"

This, of course, was the mortgage now in process of foreclosure. No objection seems to have been made by anyone to this reservation in the deed, nor does it seem to have occurred to anyone at that time that the validity of the mortgage and the amount due thereunder could ever be questioned.

Mr. Kann himself did not seem inclined to raise any such questions, for when the property came into his hands, he paid the interest on all the bonds represented by the coupons which fell due July 1st, 1894, and January 1st, 1895 (Rec., Vol. I, pp. 69, 71). These were the last coupons paid. For, on the 1st of July, 1895, a new company, *just organized by Mr. Kann*—the Penn Plate Glass Company, which now appears as appellant—received a deed of the property from Kann; and it deliberately permitted the coupons *falling due on that same day* to be defaulted. The Penn Company has never paid a cent of interest upon the bonds, although the deed given to it by Kann on the 1st of July, 1895—the very day of the first default—expressly recited, as did the deed to Kann, that the conveyance was made "*subject to a mortgage made by the Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company, of the City of New York, for two hundred and fifty thousand dollars ($250,000), dated January 1, 1891, recorded in Westmoreland County, in Mortgage Book 43, page 1.*"

Upon the defaults in the payment of coupons, the Trust Company served written demands for their payment upon the defendants the Pennsylvania Plate Glass Company, W. L. Kann, the Penn Plate Glass Company and Joseph W. Stoner, Receiver (Rec., Vol. I, pp. 126–127). Six months having elapsed, and these defaults still continuing, the Trust Company, still following the terms of the mortgage, by written instrument, declared the principal of the bonds to be due and payable (Complainant's Ex. 3, Rec., Vol. I, p. 72), and two

days later, on the 8th day of July, 1896, it filed its Original Bill for the foreclosure of the mortgage.

No defense was made by the Pennsylvania Plate Glass Company, the mortgagor. But the respondent, W. L. Kann, who had bought the property, as we have said, expressly subject to the mortgage, for the sum of $37,500, and who, having paid two of the coupons on the bonds, had formed a new company to take the title and to default in the payment of interest, of which new company he became the president; this man Kann and the appellant, the Penn Plate Glass Company, the new company so formed, which had received a deed of the property from Kann, subject to the mortgage, the consideration being stated as $83,500, both saw fit to defend the suit, to file demurrers to the bill, and, later on, to file a joint and several answer (Rec., Vol. I, pp. 45-58). Of course this was done by the same attorneys. Whether Kann carries on this litigation in his own name or in the name of the Penn Company, he acts through the same attorneys.

The demurrers were overruled (Rec., Vol, I p. 44). As the answer contained in our opinion much irrelevant and impertinent matter, the complainant filed exceptions thereto (Rec., Vol. I, pp. 58-62), which the Court overruled on grounds not affecting the merits of the controversy (see the Opinion sur exceptions, Rec., Vol. I, pp., 63-64). Thereupon replication was filed (Rec., Vol. I., p. 65), and the taking of testimony was begun on April 12th, 1897 (Rec., Vol. I, p. 65).

The complainant's testimony, practically completed by the 17th day of April, 1897, covers only 43 pages of the printed record (Rec., Vol. I, pp. 65-104, 126-128), but the defendants' testimony, begun on September 27th, 1897 (Rec., Vol. I, p. 128), and completed six months later, on March 31st, 1898 (Rec., Vol. I, p. 489), covers 372 pages of the printed record (Rec. Vol. I, pp. 128-500). Most

of this testimony was taken subject to our objection as to its relevancy and materiality.

In July, 1896, at the beginning of the foreclosure suit, the complainant being a trustee *without funds*, and the bondholders being scattered, the complainant made a motion for a Receiver, which the Court denied (Rec., Vol. I, p. 45). The receivership was desired, among other things, for the purpose of protecting the interest of the trustee and bondholders from loss by fire. This was expressly urged as one of the most important grounds for the Court's taking possession of the property on behalf of the trustee, and resulted in the giving by the defendants of an undertaking relative to insurance hereinafter more fully referred to. The Pennsylvania Plate Glass Company; its Receiver, Stoner; W. L. Kann, and the Penn Plate Glass Company had all failed to insure for the benefit of the mortgagee, and were neglecting and refusing so to do. as we shall point out more fully later. The desired relief having been refused, the property remained in the possession of the Penn Plate Glass Company, insured by it, to be sure, but not in terms for the benefit of the mortgage. Its policies, indeed, contained the following clause:

"This property is subject to a bonded indebtedness of $250,000, but it is distinctly understood and agreed that this insurance does not cover the interest of the bondholders."

On April 12th, 1898, a very great portion of the mortgaged property was destroyed by fire (Rec., Vol. II, p. 19). The defendants, it will be remembered, had but just closed their testimony under the original bill (Rec., Vol. I, pp. 489, 500); so that at the time of the fire the complainant was still being prevented by the defendants, including this appellant, from obtaining a decree of foreclosure and sale, although they did not deny the validity of the mortgage, but only

the right of certain bondholders to share in its security, and under defences which have been overruled in the decree herein (Rec., Vol. II, pp. 187–200), and which the appellant has wholly abandoned on this appeal.

The complainant hastened to file its supplemental bill, the object of which was to impress the lien of the mortgage upon the insurance effected by the Penn Plate Glass Company (Rec., Vol. II, pp. 3-24). To this bill we made the Insurance Companies parties defendant. The defendants demurred to the supplemental bill as they did to the original bill, and these demurrers were also overruled by the Court (Rec., Vol. II, pp. 24–35). Thereupon the defendants filed a joint and several answer to the supplemental bill (Rec., Vol. II, pp. 35–45); replication was filed (*Id.* p. 45) and testimony was taken by both sides. A Receiver of the insurance moneys was appointed by the Court, and directed to collect and hold subject to the final order of the Court $125,000 of the insurance moneys, which the receiver has accordingly done. Wertheimer, the owner of one hundred and sixty of the bonds, having joined with the appellant, had stipulated that he would make no claim to the insurance. And hence the figure of $125,000 was fixed upon as being sufficient to cover the ninety minority bonds with interest and charges.

The final decree was rendered July 25, 1899, by the Hon. Joseph Buffington, District Judge. It is set forth on pages 187–200 of the Record, Volume II. It ordered the foreclosure of the mortgage and a sale of the property unless the bonded indebtedness should be paid within a short day, and made reference to a Special Master to ascertain and report which of the bonds were entitled to the security of the mortgage, etc.; and ordered the sale of the proerty, as an entirety, etc. And the decree further held that the Trustee was entitled to an equitable

first lien upon the insurance and insurance moneys to the extent of all the valid outstanding bonds secured by the mortgage; and inasmuch as a Receiver of the Insurance moneys had been appointed under the supplemental bill, and a very large part thereof had been collected by him, the Court proceeded to order the application of such moneys to the payment of the bonded debt, etc. That part of the decree which relates to the insurance is contained on pages 197–199 of the Record, Volume II.

Inasmuch as counsel for the appellant have furnished us with their brief, we are able to confine our argument to those portions of the controversy which are covered by their assignment of error. The sole questions which are to be submitted to this Court, it seems, are, whether the Court below was right in sustaining our claim for a lien on the insurance moneys, and whether it was right in allowing interest on the defaulted coupons. Questions affecting our right to foreclose, elaborately argued in the Court below and overruled, seem to have been abandoned by counsel.

It will readily occur to the Court, upon examining the testimony, that the insurance companies might, perhaps, have contested the payment of so very large a sum of money if it represented the value of the equity of redemption alone, claiming that it appeared upon the face of the papers in this suit that there was no such insurable value in the property before it was burned beyond the amount of the mortgage. Bonds were outstanding to the amount of $250,000, and the testimony shows that Kann did not pretend to have paid more than $37,500 for it, or to have expended upon it, prior to turning it over to the appellant one year later, more than enough to bring the whole price with interest up to $83,500 the amount of the consideration named in the deed to the appellant. Even adding the full amount of the improvements carried out by the appellant under Kann's contracts, the cost of this equity in the property to

the appellant was only $118,000 (Rec. Vol. I, p. 483). The appellant's counsel seeking to show that the value of the equity covered by the policies was much greater than the above, quoted on page 46 of their brief some further testimony of Kann's which shows that *up to the date of his testifying* (which was in 1898) the appellant had spent about $200,000 in improvements. But it must be remembered that we are considering the value of the equity as stated in the policies, which the appellant's counsel argues strenuously were all taken out by Kann and the appellant "at the time of their respective purchases of the property" (Brief, p. 27). At that time, as shown above, the property, including the price paid at the Receiver's sale, had cost these parties only $118,000. These figures are eloquent, and speak for themselves when compared with the $450,000 of insurance claimed to have been placed *at that time* upon the *equity* alone. But even if we take the figure given by Kann as the full cost of the improvements, namely $200,000, and add the $37,500 paid for the property at the sale, there is still a long way to $450,000. And yet the property covered by the mortgage is the same property covered by the policies which, indeed, as we have pointed out, expressly declare "*this property*" to be covered by a mortgage of $250,000. The fact, then, that some $400,000 of insurance have been collected is one of very great significance. The insurance companies have paid in this fund and, under order of Court, a portion of it is retained by the Receiver to be paid to the party whom the Court decides to be entitled to it. Is this party the appellant, who in the policies themselves admits the existence of a mortgage lien of $250,000, and yet seeks to collect the *full* value of the destroyed property? Or is it the holder of the bonds whose mortgage covered the ruined plant?

Counsel for the appellant have prepared some 100 pages of a very elaborate brief in opposition to the position of the Court below. Much of it we beg to suggest, is irrelevant. The decree should be sustained for the following reasons:

1. The mortgage contained an agreement under the provisions of which the original mortgagor, the Pennsylvania Plate Glass Company, was bound to keep this property insured for the benefit of the complainant, the mortagee.

2. The mortgage creates a forfeiture on default in the performance of the covenant to insure, and that default has occurred under circumstances which impress the lien of the mortgage upon the insurance obtained by the owner of the property, the Penn Plate Glass Company, and forfeit that company's right to receive the insurance without paying the amount due on the mortgage.

3. There is an identity of interest between the mortgagor, Kann and the appellant which equity will recognize. The testimony shows that Kann wrecked the mortgagor company, and he should not be permitted successfully to carry out what the proofs show to be a well-defined plan to obtain this property for his reorganized company free of the mortgage and at the expense of the minority bondholders. In this connection, it must be remembered that Mr. Wertheimer, the holder of the majority bonds, has thrown in his interests with the defendants, and has aided them in fighting the trustee and the holders of the remaining bonds.

4. By the terms of their purchase, and under the circumstances of this case, the defendant Kann and the appellant bought the property subject to the mortgage and assumed the mortgage debt, or, at

least, agreed to indemnify the mortgagor for any liability upon the covenants of the mortgage ; and the Court below, having jurisdiction of the *res* and of the parties, had power, in order to prevent circuity of action, to enforce this obligation in the present suit.

5. Interest on coupons was properly allowed.

ARGUMENT.

I.

The Mortgagor, The Pennsylvania Plate Glass Company, covenanted in the Mortgage to insure for the benefit of the Mortgagee.

The mortgage contains in the Tenth Article the following provision relating to insurance (Rec. Vol. I, p. 35) :

"It shall be no part of the duty of the party of the second part (the trustee) to file or record this indenture as a mortgage or conveyance of real estate, or as a chattel mortgage, or to renew such mortgage, or to procure any further, other or additional instrument of further assurance, or to do any other act which may be suitable and proper to be done for the continuance of the lien hereof, or for giving notice of the existence of such lien, or for extending or supplementing the same ; nor shall it be any part of its duty *to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance* or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made ; but the trustee may, in its discretion, do any or all of the matters and things in this paragraph set forth, or *require the same to be done.*"

This provision is recited in the tenth paragraph

of the supplemental bill (R. c., Vol. II, p. 14). Now, what is it? Plainly a recognition of an *obligation* on the part of the mortgagor, the other party to the agreement, to do certain things for the benefit of the bondholders, things which every bondholder would naturally insist must be done for his security. Somebody must record the mortgage and keep the property insured. The trustee has no money belonging to the trust, and it cannot, therefore, be properly called upon to do these things which involve an expenditure of money. But the other party, the owner of the property, has all the trust funds, and all the income arising from the trust funds, and very properly, by entering into this agreement, contracts that it will do these things. By such contract it very materially increases the ease of negotiating its bonds, since it thus agrees to give the purchasers a protection to which they are entitled, and which they will always be inclined to demand. It agrees that if by any oversight it fails in its duty in this behalf, the trustee may require it to act.

Counsel for the appellant will argue that this provision does not amount to a covenant, and, in this connection, will allude to the solemn character of covenants. But what could be more solemn than such a provision coming near the end of an elaborate mortgage, duly signed and sealed with all the formalities of law—a provision, moreover, which enumerates in careful succession the several duties owed by the mortgagor to the mortgagee by virtue of the very nature of their relations? It must not be forgotten that the covenant to insure is accompanied here by a number of other covenants, every one of which imposes upon the mortgagor an obligation which could not possibly be the obligation of any other person save the mortgagor. How, in the face of this fact, can the appellant argue that the power given to the Trust Company to require insurance means anything but a promise on

the mortgagor's part to effect and preserve such insurance? We are not concerned with the mere technical meaning of the word "*covenant.*" Call this provision what you will—covenant, agreement, stipulation—it is none the less a *contract* which binds the mortgagor and imposes upon it an obligation from which it cannot escape.

The language of the Court below on this subject is very clear and forcible (Rec. Vol. II, pp. 175-6).

"There were two parties to this mortgage, the executing mortgagor and the accepting trustee. Now the liabilities or obligations created by a contract can rest originally only on a party to it. If they do not rest on some party to the contract, no obligation whatever exists. When, therefore, The Pennsylvania Plate Glass Company, in its mortgage, enumerated certain acts which the trustee might, in its discretion, require to be done, it is clear that unless it imposed the fulfilling of such requisition upon itself it imposed it upon no one. Indeed, the nature of the acts which the trustee was impowered in its discretion to require, shows that they were such as the mortgagor would naturally perform.

"Thus the trustee could require further instruments of conveyance or assurance. These would be executed by the mortgagor, the owner of the fee. It might require the payment of taxes. These the mortgagor, against whom they were assessed and who was legally bound for them, would naturally be the one to pay. So with the insurance. The owner of the property, the holder of the legal title, the person who had the insurable interest, would be the one to insure. Vesting in another a right to make a requisition implies an obligation to honor such requisition when made. We are, therefore, of opinion that by the terms of the mortgage the mortgagor company covenanted to insure on request of the trustee. The acts of the parties were in accord with such construction. Prior to the receivership the mortgagor company kept the property insured for the benefit of the bondholders, and its obligation so to do was recognized and enforced by the State Court during the receivership by its issue of receiver's certificates for the purpose.

These policies were in force when Kann purchased. The proofs show they were turned over to him, and he was informed by the receiver they were outstanding. The covenant of the mortgagor to insure on request being shown, demand being made upon it for such insurance, and its failure to comply continued for six months vesting a right of entry and possession in the trustee, we next inquire what was the relation to this duty of a successor in the possession and title of the mortgagor to whom such possession was delivered and the equity of redemption conveyed by an order of Court and deed based thereon, in the terms set forth in the foregoing opinion on the original bill?"

The appellant's counsel take the position in their brief (Appellant's Brief, pp. 57–59) that even if this be a covenant to insure, it is not a covenant to insure for the benefit of the mortgagee. To sustain this rather singular view, they cite an English decision by Kindersley, V. C., *Lees* vs. *Whiteley*, L. R., 2 Eq., 143. But the reasoning of the Vice-Chancellor is not very cogent. He seems to have thought that the presence of such a stipulation in the mortgage before him might be accounted for on some other theory than that it was demanded by the mortgagee as a covenant to insure *for his benefit;* and he suggests that there is some advantage to the mortgagee in getting the mortgagor to insure, although for the latter's sole benefit, "because it is for the interest of the mortgagee that his mortgagors should be in a solvent condition, and that, in case their property should be destroyed by fire, they should still have the means of paying the mortgage debt." This seems to us to be really only another way of saying that the insurance covenant *was* a covenant to insure for the benefit of the mortgagee; for had it been *expressly* such a covenant and had the mortgagor placed the insurance in his own name alone and collected the insurance, the only means open to the mortgagee to avail himself of the covenant would have been by a suit against the mort-

gagor individually. But if the remark of the Vice-Chancellor were otherwise warranted, it would still remain difficult to understand why a party should insert a provision such as the Vice-Chancellor construes this one to be, in a *mortgage*, which is an instrument designed to create a *security* for a debt, and not the debt itself, and which is taken by the mortgagee for the express purpose of saving himself from the necessity of being concerned about the solvency or insolvency of the mortgagor. His object is to get an indestructible *lien* on the property. And therefore to construe a clause which obviously is designed to protect his *lien* into a clause which has no regard whatever towards the *lien*, but looks only towards the *debt*, is to strain the meaning of language and to make a new contract for the parties, which the learned Judge expressed his desire not to do.

But, again, if the argument had any force as applied to the instrument then before the Vice-Chancellor, which was merely a bill of sale of certain machinery to secure an advance, yet it would have no application to such an instrument as the present one—a mortgage of a plate glass plant, full of stipulations even in the very clause containing the insurance covenant, looking wholly towards the better securing of the *lien*;—a mortgage, moreover, bearing semi-annual interest and thus placing it fully within the power of the mortgagee to know when the mortgagor should become insolvent. Besides all this, if the contention pressed by the appellant's counsel (Appellant's Brief, pp. 99-100) is correct, namely, that Article Fourth of the mortgage excludes all personal liability of the mortgagor and leaves the mortgagee wholly to the *lien* created by the mortgage, then it is apparent that the reasoning of Vice-Chancellor Kindersley is inapplicable; for, in such event, the solvency or insolvency of the mortgagor could not possibly interest the mortgagee, who under no circumstances could then come against

the mortgagor personally; and hence the clause in the mortgage with reference to insurance could not be construed as Vice-Chancellor Kindersley construes it, and would necessarily have to be explained on the theory that it was a covenant to insure for the benefit of the mortgagee.

The covenant here was not a naked promise to insure. The language surrounding it evinces very clearly that it was a covenant peculiarly for the benefit of the mortgagee and peculiarly within the power of the mortgagee to enforce.

II.

The Mortgage provides for a Forfeiture upon a Default in the Performance of the Covenant to insure. That Default has occurred under Circumstances which impress the Lien of the Mortgage upon the Penn Plate Glass Company's Policies and forfeit that Company's Right to receive the Insurance without paying the Amount due on the Mortgage.

The mortgage contains in the Second Article a provision to the effect that in case of a default, among other things, "in the performance of any *covenant, agreement or stipulation*" contained in the mortgage and thereby "required to be kept and performed" by the mortgagor company, and the continuance of such default for the period of six months after demand made in writing by the trustee upon the mortgagor company for the performance of said covenants, it shall be lawful for the trustee, personally, or by its attorneys or agents, to enter upon the mortgaged premises and to evict

the mortgagor company and to operate the plant (Rec., Vol. I, p. 25). Under similar conditions, the mortgage gives the complainant the right to sell the property, and by such sale perpetually to bar all claims of the mortgagor company and of *all other persons claiming by, through or under it* (Rec., Vol. I, pp. 26-27). And under similar circumstances the mortgage gives the complainant the further right to bring suit to foreclose the mortgage (Rec., Vol. I, p. 28).

Now, *as a fact*, there was a failure on the part of the mortgagor company, and of those taking under it, to carry out any of the covenants or stipulations in the mortgage, *including the covenant or stipulation as to insurance recited above* (Rec., Vol. I, p. 35) ; and on a continuance of such failure for six months after demand in writing by the trustee for the performance of such covenant or stipulation, the trustee then and there had a right to take possession of the property. And in fact the Trustee did make demand, and more than six months later did attempt so to take possession at the beginning of the foreclosure suit by and through a receivership, which was denied it because of the opposition of the appellant and the defendant Kann, and because of their filing a bond authorizing the payment of insurance out of the *Penn Plate Glass Company's* policies if the Court should adjudicate that there was any obligation on the part of that company to insure. Consequently there exists a clear case in equity entitling the complainant to collect the amount of the loss under the mortgage out of the proceeds of those policies.

The evidence sustains all the allegations of fact necessary to the above contentions.

The original mortgagor, the Pennsylvania Plate Glass Company, never questioned its obligation under the mortgage to keep the mortgaged prem-

ises insured. Indeed, from the very beginning of the trust, it placed and kept alive insurance for the benefit of the bondholders. The same obligation was recognized and the same course pursued by the State Court's Receiver Stoner, whom Kann's course as a creditor, as we shall subsequently show, forced the directors to have appointed.

The Pennsylvania Plate Glass Company continued in possession of the property until March 19th, 1894, when Stoner was appointed Receiver in the proceedings for the dissolution of the company, begun by the directors Semmer and others in the Westmoreland County Court (Rec., Vol. II, pp. 67, 87). Stoner had been stockholder, director, secretary and treasurer of the Company (Rec., Vol. II, p. 65), since 1893, the second year of its existence. The mortgage, it will be remembered, was made in January, 1891. Stoner was acting in these several capacities, with the exception only of treasurer, in December, 1893, and in the early part of 1894, when Kann became treasurer, and the Receivership commenced (Rec., Vol. II, pp. 66, 70, 75).

As an officer of the mortgagor company Stoner was familiar with its business and knew the condition of the insurance which he had obtained on its plant (Rec., Vol. II, p. 66). He also knew all about the mortgage of January 1st, 1891. He knew that the company had procured insurance *for the benefit of the trustee*, and that when he became Receiver in March, 1894, there was about $200,000 of such insurance outstanding (Rec., Vol. II, pp. 66, 67, 71). This insurance had three, six and nine months to run, and some even a little longer (Rec., Vol. II, pp. 67, 71). Moreover, after he became Receiver, he himself as such took out insurance for the benefit of the mortgagee, under order of the Court, Receiver's certificates amounting to four or five thousand dollars being issued for the purpose of paying the premiums, so anxious

was the Court to preserve the insurance which the mortgage required (Rec., Vol. II, pp. 67,71). The insurance so taken out by Stoner ran for six months, more or less. In all these policies, both those taken out before and those taken out after the Receiver's appointment, the loss was made first payable to the mortgage trustee for the benefit of the bondholders (Rec., Vol. II, p. 73).

Kann,—the creditor who had forced the company into the receivership,—made no opposition to any of this, and we can imagine the treatment which he would have met with from the Westmoreland Court if he had opposed its insurance orders on the ground that the bondholders were not entitled under the mortgage to the benefit of insurance placed by the Mortgagor Company. The Court was protecting the property and was not concerning itself with any quibbles of that nature. These policies were outstanding at the date of the Receiver's sale, in June, 1894, when the property was sold to Kann, subject to the mortgage, the latter taking a deed July 2d, 1894 (Rec., Vol. II, p. 71).

Now, what became of these policies? They were never assigned to anybody. They were never renewed. *They were simply allowed to expire* (Rec. Vol. II, pp. 71, 73, 74). As for the actual policies themselves, the witness Stoner, though never yet discharged as Receiver, is ignorant of their whereabouts, and, though requested by us to produce them, is unable to do so (Rec., Vol. II, pp. 73, 127, 128). His memory as to the disposition of the policies is extremely hazy, as it is also when asked to give the amounts of the policies and the names of the companies that issued them. At first, in testifying, he stated that the policies were stored in a vault in Kann's office (Rec., Vol. II, p. 74). But the next day he stated that they were among certain papers left at Irwin "that weren't considered of any special value," and that were destroyed by the fire (Rec., Vol. II, pp. 127, 128).

The appellant's counsel, on page 29 of their brief, endeavoring to show that Judge Buffington was wrong in his opinion that these policies were turned over to Kann, who knew all about them, quote a few lines of this witness' contradictory testimony as to the delivery of these policies to Kann. But if his entire testimony be read, the Court will receive the same impression which Judge Buffington received and embodied in his opinion in the passage quoted by the appellant's counsel (Brief, p. 28). But it is of no importance whether Stoner *delivered* these old policies to Kann or not. The fact is undisputed that Kann knew of them, knew all about them, and deliberately and confessedly allowed them to lapse.

The above being the attitude taken towards the insurance which the mortgagor company, acting under its covenant, and its Receiver, acting likewise under the covenant as enforced by the Westmoreland County Court, had taken out to protect the mortgagee, the records of the Westmoreland County case show that upwards of $330,000 of insurance, procured through the agents, Ringwalt & Agnew and Zahn, was thus wilfully allowed to lapse (Rec., Vol. II, pp. 128–9). Yet this man, Stoner, officer and Receiver of the Mortgagor Company, and the defendant Kann, knew both before and after the beginning of the Receivership, even at that early day, in 1893–1894, long before the foreclosure suit was begun—indeed long before any default in the payment of coupons—*that the Trust Company was standing on the covenant in the mortgage, and was insisting on the keeping up of the insurance for the benefit of the mortgage* (Rec., Vol. II, p. 76). And Stoner says further that it was *because* of this insistence of the Trustee that the Pennsylvania Company did keep up the insurance until it passed into the Receiver's hands, and the Receiver himself pursued the same course (Rec., Vol. II, pp. 77, 130).

When asked if the Trustee's insistence had not led to the application, Mr. Stoner replied :

"Yes; and my own belief and knowledge that the property deserved protection for the benefit of creditors—— * * * and among other creditors * * * the mortgagee." (Rec., Vol. II, p. 130; and Record of Westmoreland County case offered in evidence by us at Record, Vol. II, p. 130).

Now, when the defendant W. L. Kann took possession of the property subject to the mortgage in July, 1894, *he knew all about the insurance.* Stoner had notified him (Rec., Vol. II., p. 74). Kann, it will be remembered, had become stockholder, director and treasurer of the mortgagor company in December, 1893, and January, 1894 (Rec. Vol. II, p. 57; Rec., Vol. I, pp. 480, 481). He had also become a very large creditor of the Company, under circumstances of a peculiar nature; and, indeed, it was Kann, who by his threats and proceedings against the Company, drove it into the hands of a receiver, and deprived it of the power of continuing to carry out the insurance covenant, as will be more specifically pointed out in the next point of our brief. The receiver considered his own active duties at an end when he had sold the property and deeded it to Kann. So that, soon after July 2d, 1894, when the mortgagor company's policies and the policies of the receiver for the mortgagee's benefit, had expired by their terms, *there ceased to be any insurance for the protection of the mortgage, and the insurance covenant was violated by the mortgagor company once and for all.* That violation still continues. Never since then has a dollar of insurance been taken out by the mortgagor company or the receiver, although, as we shall soon point out, the Trustee continued its former insistence upon the fulfilment of the covenant, and served *written notice* of that insistence on the *mortgagor company and the receiver*, as well as on Kann himself, the real party in interest, and on the appellant, the Penn Plate Glass Company.

Kann, once in possession, immediately took the ground that he would not insure for the benefit of the Trustee. He held the property personally for a year, from July 2, 1894, to July 1, 1895. As admitted in the answer to the supplemental bill, both he and his new Penn Company, organized by him, refused to insure for the benefit of the bondholders although requested so to do by the Trustee.

"They admit that long before the original bill was filed in the case, they gave distinct, repeated and written notices to the said plaintiff that they were not bound to insure the said premises for the benefit of the plaintiff, and that they would not nor would either of them insure the said premises for the benefit of the plaintiff as trustee, and of the bondholders secured by the said mortgage * * *, and they admit that they did not preserve existing insurance or effect new insurances for the benefit of the bondholders secured by the said mortgage" (Answer, Rec., Vol. II, p. 42).

And this admission is coupled with the further admission that both Kann and the Penn Company had full, actual and complete notice at the time of taking the property respectively of all the provisions, covenants and stipulations of the mortgage including those relating to insurance.

The appellant's counsel, pursuing some theory of their own about the grounds of our claim, insist here and there in their brief, as, for instance, on page 30, that the trustee knew of Kann's action in the premises, as if we took an opposite position. On the contrary, the very gist of our claim is that we did know of his action, and protested against it everlastingly, and reiterated the demands required by the mortgage. The appellant's counsel have wholly misapprehended our position, and there is not one word in their brief controverting the argument contained in this point of our brief.

With the defaults above outlined in the performance of the insurance covenant of the mortgage in

existence on the part of the mortgagor company, the Receiver, W. L. Kann, and the Penn Plate Glass Company, the Trustee demanded in writing the performance of that covenant by all the above parties and thus availed itself of the right to "require the same to be done," expressly reserved to it in the mortgage.

That demand was made by written notice dated November 29th, 1895, served by the Farmers' Loan and Trust Company, on Joseph W. Stoner, Receiver of the Pennsylvania Plate Glass Company (Plff's. Sup., Ex. No. 1); on Philip Semmer, President of the Pennsylvania Plate Glass Company (*ib.*, No. 2); on W. L. Kann (*ib.*, No. 3); and on W. L. Kann, President of the Penn Plate Glass Company (*ib.*, No. 4, Rec., Vol. II, pp. 131, 132).

Now, this being the state of affairs, and the parties above named persisting, in spite of the written demand, in violating the insurance covenant, and default in the payment of coupons having occurred, the Trust Company declared the principal of the bonds to be due, and filed its original bill to foreclose the mortgage. This bill was filed on the 8th day of July, 1896, *at which time more than six months had elapsed since the serving of the written demands for insurance as above stated at the end of November, 1895.*

Immediately upon the filing of the bill,—which prayed, among other things, that

"your orator may be placed in possession of the mortgaged premises personally, or that a Receiver may be appointed in this cause of all and singular the rights, franchises and property, of every name and nature, of the said defendant the Pennsylvania Plate Glass Company, with power and authority to operate said plate glass works and carry out the business of said mortgagor company under the protection of this Court, with all the usual powers and duties of Receivers in such cases"

—the complainant made a motion for a Receiver, filing with the Court as part of the motion papers the written demands for insurance already referred to. *The defendants Kann and the Penn Company, being identical in interest were present by their attorney—the same attorney.* The motion was strenuously opposed by him on behalf of his clients, appearing in his double capacity ; and by reason of this opposition the motion was denied by the Court (Rec., Vol. II, p. 92) on the ground that the Penn Company was solvent and able to take care of the property.

And just here we may be allowed to reflect upon the consequences that have flowed from this opposition of the appellant and the defendant, Kann, and the resulting denial of the receivership. But for that action, the present situation would never have arisen. The duty of a Receiver appointed in this cause to insure for the benefit of the bondholders would have been even more imperative than was the duty of the Receiver Stoner to do the same thing. And we have already pointed out how carefully the Westmoreland Court guarded the mortgagee's interests. Here was an overdue mortgage in default to the amount of over $260,000, principal and interest matured. We were entitled to a Receiver to take the property into his hands, and it was the duty of the Court so to take charge of the property and to protect it by insurance and in every other way, for the benefit of whom it might concern. With great respect we state the situation plainly. Even had the Court appointed a Receiver and directed the taking out of full insurance, no more insurance could have been effected than the aggregate amounts of the existing $450,000, and the proof of this is that the appellant, if successful, will actually have collected out of the insurance, *not simply the value of its equity in the lost property, but the total value of the destroyed property.*

The duty of a Court to protect the subject-matter of a mortgage by insurance is too plain for argument, and the protection of the property is the primary object of a Receivership.

In *Wallace* vs. *Loomis* (97 U. S., 146), it was said that the power of a Court of equity to appoint managing Receivers of corporate property is "a part of that jurisdiction, always exercised by the Court, *by which it is its duty* to protect and preserve the trust funds in its hands." And this language was repeated in *Quincy, etc., R. R. Co.* vs. *Humphreys*, 145 U. S., at p. 104.

Now let us clearly understand the situation. The Trustee moved for a Receiver to insure and preserve the property. The Court erred in failing to grant the motion. *The Trustee's motion for a Receiver was equivalent to an attempt to take possession.*

In *American Bridge Co.* vs. *Heidelbach* (94 U. S., 798) the Court said:

"The mortgagees had the option to take personal possession of the mortgaged premises, or to file a bill, have a Receiver appointed, and possession delivered to him."

In *Allen et al.* vs. *Dallas & Wichita R. R. Co.* (3 Woods, 316), a railroad mortgage gave the trustees the right to enter upon and take possession of the railroad company's property and operate it in default of the payment of interest. A default having been made, the trustees filed their bill for foreclosure, instead of entering upon the property, and asked for the appointment of a Receiver. It was held that such default was a sufficient ground for the appointment of a Receiver upon the application of the Trustees, and that the Trustees were entitled to a receivership. The Court said:

"It remains to consider whether there was any necessity for the appointment of a Receiver, and

whether, under all the circumstances as they now appear, a Receiver should have been appointed.

"In my judgment, independent of any necessity for the appointment of a Receiver to protect and preserve the trust property, it was the right of the bondholders, under the terms of the trust deed, to have a Receiver appointed to take possession of the trust property.

"The rights of holders of negotiable bonds issued by a railroad company and secured by a mortgage upon its property, are not to be measured by the same rules as are applied to an ordinary mortgage of a farm or house and lot, to secure one or two notes held by one mortgagee.

"In this case the trust deed pledged the receipts and income of the railroad property for the payment of the principal and interest of the bonds. It declared that after three months' default in the payment of the principal and interest of the bonds, or any part of either, upon the written request of one-tenth of the holders of the bonds, it should be competent and lawful for the trustees to enter upon and take possession of the trust property, and to use and employ the said railroad and the property and appurtenances proper for its use, to make all necessary repairs, pay all proper expenses of the management thereof, including taxes, and to apply the proceeds to the payment, *pro rata*, of the principal and interest due on the bonds. In short, it was made the duty of the trustees in the contingency named, to exercise the rights and perform the duties of Receivers appointed by the Court.

"These provisions were inserted in the deed of trust to give credit to the bonds, to enhance their value and induce capitalists to purchase them. *They constituted a part of the consideration which the railroad company offered to purchasers of its bonds.*

State of Maryland vs. *The Northern Central R. W. Co.*, 18 Md., 193.
Dunville vs. *Ashbrook*, 3 Russ., 99 (3 Eng. Chy. Note C).

"A mere default in the payment of the debt is no ground for the appointment of a Receiver, but

this is not true where there is a stipulation in the mortgage that the mortgagee shall have the rents.

Whitehead vs. *Wooten*, 43 Miss., 523.
Morrison vs. *Buckner*, Hempst., 442.

"Are all these provisions of the deed of trust to be disregarded? If not, are the rights of the bondholders impaired by the fact that the trustees, instead of taking possession of the trust property, as they had a right and it was their duty to do, have applied to this Court to assist them in the execution of the trust whose duties they have assumed?

"These trustees might, as is sometimes done, have first taken possession of the trust property under the authority of the trust deed, and upon written demand of one-tenth of the bondholders, and afterwards filed their bill asking the Court to protect their possession and aid and instruct them in the discharge of their trust. Such a course would have been perfectly proper and competent. But having chosen to file their bill in the first instance, neither they nor any bondholder has lost any right, *and it is the clear duty of the Court to give them all the rights conferred by the deed of trust.*

"By the terms of this trust deed the bondholders, upon default in the payment of interest, are entitled to have the income and profits of the trust property applied to the payment of their debt. This can be done only by possession taken of the trust property, either by the trustees or a receiver. By a failure to take possession, the bondholders are in danger of losing their right to the income and profits.

American Bridge Co. vs. *Heidelbach*,
94 U. S., 798.

"It is evident that the rules applicable to the appointment of a receiver upon an ordinary mortgage do not apply here. The bondholders are not precluded from the appointment of a receiver because it is not shown that the property is insufficient to pay the mortgage debt, that the mortgagor is insolvent, or that the trust property is in jeopardy, or because the amount due is in dispute.
* * *

"Regarding, therefore, only the terms of the

trust deed, upon proof of a three months' default in the payment of the interest, and upon a written request made by one-tenth of the holders of the bonds upon the trustees, that they exert the powers conferred upon them by the trust deed, it would be the duty of the Court, without further showing, to appoint a receiver, so that the value of the bonds, as commercial paper, might be preserved, and all the rights of the bondholders secured."

In the case at bar the mortgage covered the rents, issues and profits. Had the Court appointed a Receiver, as prayed by the Trustee, those rents, issues and profits would have been collected by him and applied in part to the payment of insurance premiums. As it is, by the failure to appoint a Receiver all the dangers alluded to in the above opinion have befallen the present unfortunate bondholders, and the failure of the Court to appoint the Receiver *was due entirely to the action of the appellant and its organizer, Kann.*

Mr. Ferguson, put on the stand after Mr. Schoyer had been called by us and had refused to testify (Rec., Vol. II, pp. 90-91), described the events as follows:

"According to my recollection, I received notice from Judge Buffington that he had concluded to deny the appointment of a Receiver. According to my recollection it was the following day. I went into Court, *Mr. Schoyer* was there and *Mr. Kann* was there, and I said to the Court that in considering the motion for a Receiver, it occurred to me that the Court had not considered the fact that this property was without insurance; that there was danger of fire; that my client was a trustee without funds, and that that was a matter that ought to be considered, and that we were entitled to insurance. The other side denied that they were bound to insure under the terms of the mortgage. I insisted we should have insurance, they denying that we were entitled to insurance under the mortgage, and under the circumstances Judge Buffington said: 'I can't decide that question,' and intimated

to them that if they were bound to insure they ought to protect us, and they denied they were bound to insure, and the paper signed by Mr. Kann and Mr. Wertheimier was given to us in pursuance of my demand for insurance, and filed in Court, and is on file to-day" (Record, Vol. II, pp. 92-93).

By this bond, it was agreed by the defendant Kann and by Mr. Wertheimer that if any obligation should be shown to exist on the part of *the Penn Company* to insure for the benefit of the mortgagee, the insurance taken out by *the Penn Company* should be applied to the payment thereof. The bond is set forth in full on pp. 43-44 of the appellant's brief. A good deal is said in that brief about the proceedings at the time of our motion for a receiver and the meaning and effect of the above bond, with a view to showing that Judge Buffington was wrong in his opinion as to the facts. We will here append a short discussion of appellant's criticisms in this regard. And, first, we will call the Court's attention to the fact that this appeal is from the *decree* and not from the *opinion*. There are no "*findings*" and no *conclusions* except such as are contained in the decree. The adjudicating passages in the decree—which was settled by the attorneys for both sides before the Court—relative to the insurance branch of the case are contained on pages 197-198 of the Record, Volume II. If the adjudications contained in those passages can be sustained on the evidence and the law, the appeal must be dismissed, without regard to whether this Court concurs in the arguments included in the opinion of the lower Court or not.

We consider that Judge Buffington's opinion can be sustained in every particular; but should this Court differ from him on any point, we desire to say that we come here on the entire record. The appellant's counsel, in referring to passages of the opinion, as "findings," and conclusions, as they do repeatedly (Brief pp. 25-26, 28, 31-2, 35, 45, etc.),

and then seeking to show that these findings and conclusions were error, are departing from the course which they should pursue in order to sustain their appeal. They must show to this Court that upon the evidence and under the law the *decree* which we have obtained cannot be upheld.

We refer to the above practice of our opponents because they have undertaken to set up in their brief as the theory upon which our case is based a proposition which is not only not our proposition at all, but never was advanced by any one until the appellant's counsel created it here in order to overturn it and thus to produce the impression that they were overturning our contention. Pages 23 to 51 of their brief are given up entirely to an attempt to controvert the following proposition which they claim to be ours : that the Penn Plate Glass Company agreed by the bond given at the time of our motion for a receiver to place insurance on the mortgaged premises for the benefit of the trustee ; that it subsequently, secretly and without the knowledge of the Court or the trustee, departed from this agreement, misled the trustee, and placed insurance for its own benefit alone ; that, therefore, upon the destruction of the property, an equitable right against the Penn Company's policies sprang into existence in favor of the trustee. The pages of the appellants' brief above mentioned show that the whole effort of counsel was directed to proving the above proposition to be the basis of the decree, and to demonstrating its fallacy. Yet, it is absolutely certain that no such proposition ever entered our minds ; that the case was neither tried nor argued on any such proposition, and that Judge Buffington never wrote his opinion with any such intendment. While it is true that Judge Buffington does refer to the fact that a large part of the Penn Plate Glass Company's policies were taken out after the motion for a receiver was made, he does so only in the course of arguing and as one of the many facts

in the case from which the complainant's equity has arisen. If that fact were entirely absent from the case it would not affect our right to succeed, nor the grounds of our argument or of that of Judge Buffington. The principles upon which we have always rested this case are those to be found in this brief, and we ourselves have had no trouble in understanding the very clear logic of Judge Buffington. It is therefore more difficult for us to perceive how the misapprehension on the part of appellant's counsel could have arisen.

On this subject we have now only to add a few remarks as to certain conclusions in this part of the appellant's brief which are not borne out by the evidence.

We have already pointed out that far from contending that the trustee was ignorant of Kann's attitude in the matter of insurance, it constantly, and from the beginning, protested against that attitude and insisted upon his carrying out the covenants of the mortgage. The reflections of counsel seeking to prove knowledge on the part of the trustee are therefore a work of supererogation. We admit that we had knowledge, and we say that we acted upon it. But when counsel go further and undertake to state that the trustee knew before the fire what the character of the Penn Plate Glass Company's policies was, or, indeed, whether that company had any policies or not, they state something which is not in the record, and we may therefore be permitted to contradict this and to say that the trustee had no such knowledge. As for the meaning of the word "existing" contained in the bond given at the time of our motion for a Receiver, that is entirely immaterial to our case. We are not concerned with whether it meant policies existing at that time, or policies existing at the time when a fire should occur. The latter would be the natural and obvious construction of the phrase and hence we cannot agree with

the appellant's counsel when they adopt the opposite construction and seek to draw inferences from it. But the matter is quite outside the issue, as is also the question whether the policies of the appellant were taken out before or after the motion for a Receiver. When the Court shall have completed its reading of our brief, it will perceive that the time when those policies were taken out is immaterial to our contention. What we claim is that under the circumstances of this case *any* insurance covering the property and belonging to the Penn Company is affected with an equitable lien in favor of the trustee. But even if the time of the taking out of the Penn Company's policies were material, the appellant would find it impossible to point to any evidence in the case showing that Judge Buffington was wrong in his statement that a large part of the Penn Company's insurance was placed after the motion for a Receiver had been made. In any event the trustee's demands for insurance antedated the motion for a Receiver, the organization of the Penn Company and the purchase of the property by it. Those demands continued throughout all the transactions, and no insurance was ever effected by the Penn Company until long after it had been repeatedly requested by the trustee to insure for its benefit, and had refused to do so.

One other point of the appellant's counsel on this head requires attention. They say that the bond given at the time of the motion for a Receiver was a personal obligation of Kann and Wertheimer and in no sense a promise by the appellant, arguing as if this suit were based in some way upon the obligation in question, which it certainly is not. But the effect of the giving of the bond is entirely different from what they apprehend. The bond was given in order to enable the *appellant* to remain in possession of the property. Its effect was to induce the Judge to deny our motion for a receivership, to which we had a right, and to keep the trustee out of pos-

session. It was given in open Court, under agreement entered into by the attorney for the *appellant*, appearing as such (who was also attorney for Kann), with the *appellant* present by its President, Kann, as well as by its attorney. It is conditioned upon the adjudication of our claim against the *appellant*, and requires the obligors to pay out the amount of the bond, in case of an adverse decision, from *insurance belonging to the appellant.* It was nothing if not an undertaking given on behalf of and under the direction of the *appellant*, and whatever consequences flow from the giving of that bond have arisen by virtue of an act of the *appellant* itself.

Coming back now to the thread of our argument, we have shown above (1) a covenant or stipulation in the mortgage and by the mortgagor company to insure; (2), a provision in the mortgage that upon a breach of this covenant by the mortgagor and the continuance of that breach for six months after demand by the trustee for the performance of the covenant, the trustee could seize the property or foreclose the mortgage; (3), a breach of the covenant by the mortgagor; (4), a written demand by the trustee for the performance of the covenant; (5), a continuance of the breach for six months after that demand; (6), a similar demand addressed to the defendant Kann and the appellant, who had bought the property subject to the mortgage for a nominal sum, and had been instrumental in producing the insolvency of the mortgagor company; (7), the bringing of a foreclosure suit by the Trust Company, praying to be put in possession personally, or through a Receiver; (8), an attempt by the trustee to take possession through a Receiver, based in large part upon the necessity for insurance; (9), the frustration of that attempt by the appellant, a purchaser subject to the mortgage under peculiar circumstances and for a nominal

consideration; (10), an agreement, given on behalf of the appellant in order *to prevent such possession*, undertaking to pay any obligation to insure for the benefit of the mortgagee which might be declared to exist out of the *appellant's* own insurance; (11), a subsequent destruction of the property by fire, while the trustee was being kept out of possession and was being obstructed in obtaining a decree of foreclosure and sale through defenses by *the appellant*, which defenses it has now abandoned as untenable.

Surely we have made out a clear right to have the Penn Plate Glass Company's insurance moneys *substituted* for the lost security of the mortgage.

This claim of ours does not in any sense rest upon a theory of *personal* or *individual* liability to pay the bonds or to perform the covenants on the part of the mortgagor company, or any one else; nor yet upon any theory of covenants running with the land. Counsel's argument on those points, whatever its merits or demerits, has no application to the present controversy. The above claim rests on the right accorded to the trustee by the mortgage to *foreclose or take possession* in case of a breach of the covenant by the mortgagor, who *has* broken it. It rests on the right of the trustee to enforce the *lien* of the mortgage for such a breach of the covenant; and our contention is that under the circumstances outlined above, the property having been destroyed, the *lien* of the mortgage *is* capable of enforcement and must be impressed on the insurance fund, substituted for the lost property.

III.

The History of the Destruction of the old Company and the Organization of the new, discloses Circumstances which make it inequitable for the Appellant to receive the Insurance as against the Mortgagee.

We come now to another view of the case under the supplemental bill. There is, in fact, an identity of interest in the parties with whom we are dealing which equity will recognize. The old Pennsylvania Plate Glass Company was apparently a solvent concern, fulfilling its duties under the mortgage, until in an evil hour its officers met the defendant William L. Kann. He discerned a field for his peculiar operations, and became a stockholder, director and treasurer. Worse than all he became a creditor, and was thus enabled to wreck the company and to become himself the owner of its property. As such ownership might expose him to criticism if the covenants of the mortgage were not fulfilled, he proceeded to organize the Penn Plate Glass Company, and to hold the property, not in his individual name, but in the name of that organization. But no Court of equity can fail to see the true situation. It is Kann and no one else who is fighting for this insurance money to-day, whether he appears in the name of the defaulting corporation or in his own name.

Opposing counsel have a good deal to say as to whether the covenants *run with the land* or not. But our contention does not rest upon any theory of that kind.

There is, indeed, no iron rule with reference to covenants running or not running with the land. While generally a covenant to insure is a mere personal covenant, circumstances might exist to make it run with the land. And there are

many authorities which distinctly hold that covenants to insure do run with the land, as much as covenants to repair or to rebuild, or for another term:

In re Sands' Ale Brewing Co., 3 Bissell, 175.
Vernon vs. *Smith*, 5 Barn. & Ald., 13.
1 Washburn on Real Property, 426.

But in this case, whatever would have been the effect of such a covenant if *strangers* not cognizant of the facts had purchased the property at the Receiver's sale, we assert that under the existing circumstances, Kann and the appellant, for the purposes of equity, and whether the covenant runs with the land or not, stand in the place and stead of the Mortgagor Company itself, and must be held bound by the covenant to insure, not perhaps to the extent of being obliged to respond in a court of law, but surely in a court of equity which has these insurance funds in its hands. A large part of the appellant's brief is taken up with argument to show that covenants to insure do not run with the land. Yet the Court below distinctly stated in his opinion that he did not rest his decision on the doctrine that such covenants run with the land (Rec. Vol. II, p. 177).

We have already shown that the old company and its Receiver recognized and fulfilled the obligation to insure the property, and that when Kann bought in June, 1894, insurance existed to his knowledge for a large amount in favor of the trustee, which he allowed to lapse.

But even before that date, and in 1893, Kann had become associated with the Pennsylvania Company, the original Mortgagor Company, under circumstances, which, to say the least, were very peculiar.

We call the Court's especial attention to Kann's own testimony before he knew how it might be

used against him. He was called by the defendants under the original bill *before the fire occurred*, and he gave the following testimony about his connection with the original company. He was first approached, he says, in the early part of 1893 by Mr. Semmer, who was largely interested in the company (Rec., Vol. I, p. 480). He then had made no loans to the company (*Ib.*). But in December of that year he became its creditor by lending it money, and, in fact, discounting for it a note of $3,500 (*Ib.*, pp. 471–9). Prior to the making of this loan, as he testifies, he was handed a statement by the officers of the company purporting to show their financial condition (*Ib.*, p. 471). This statement (Ex. No. 21), together with other statements made by the officers at about the same time, purporting to show that the company was in a flourishing condition and was making money notwithstanding a prolonged strike, and notwithstanding the additional fact that the panic of 1893 was affecting all business, was what induced Mr. Kann, as he testifies, to advance money in November, 1893, and to "become interested in the company" (*Ib.*, p. 472). On the strength of that statement he declares he "became interested in the company" (*Ib.*, p. 473), "*agreeing to identify*" himself with it (*Ib.*, p. 480), and was elected an officer (*Ib*, p. 473), director and treasurer of the Company. "I accepted the position," he says, "predicated on that statement in open meeting that if that statement was true, and they could substantiate it, that I would accept the position which they had elected me to—as treasurer of the Company, and if, upon examination of their books, which I asked ten days' time to do, if the examination proved that that was true, I would accept it" (*Ib.*, p. 473).

The election took place January 10th, 1894, and, as he testifies, he accepted the position with the understanding above set forth (*Ib.*, p. 481). Two days from his election, on January 12th, 1894, he

went to Irwin, where the works were, and proceeded to investigate the books of the Company, with every opportunity given him to examine them (*Ib.*, p. 481). *He found that the Company was not solvent*, on the contrary that it was, and always had been, insolvent. He says, "*At that time* I had evidence that they had always been so from the inception of their business" (*Ib.*, p. 477). The deficiency according to him amounted to upwards of $119,000 (*Ib.*, p. 477). Immediately, on the same day, January 12th, he tendered his resignation, as he says (*Ib.*, p. 481). The Executive Committee was called at his instance on that day (*Ib.*), but somehow he didn't get his resignation accepted, and was still holding over as treasurer of the Company on March 15th, 1894 (*Ib.*, p. 482)!

It may perhaps be considered surprising that this man who had been so uneasy about becoming connected with the company, which he now knew to be absolutely insolvent, should have continued to hold over as treasurer after his discovery of the insolvency, from January 12th until March 15th—two entire months. It must be remembered that at that time his loans to the company were quite small, a few thousand dollars at the most; and if he is to be believed, his holding of the company's stock consisted of a single share, transferred to him by Cowen or Semmer, for which he never paid (*Ib.*, p. 480). So that he could have had no *personal* reason for holding over, no necessity to stay there for *the protection of his own interests*. Of these circumstances he makes two explanations, widely different from each other, and both very odd, to say the least. The first is that he held over under protest, because the officers of the company claimed "that they had then an offer to sell out one-third of the controlling interest in that plant for a very large sum of money, and they pressed me to take no arbitrary steps un-

til they could consummate that, when they would relieve me of the position and pay me back the money which I had advanced" (*Ib.*, p. 473). This explanation throws an interesting light on his ideas as to business propriety. According to the above statement, which is in his own words, knowing that this company was hopelessly insolvent, and had been so from the beginning, he was nevertheless willing to aid those interested in it in foisting one-third of the controlling interest in the plant on *somebody* "for a large sum of money." To assure the success of this nefarious scheme, he wants us to understand that he was willing to remain treasurer of the insolvent corporation for a while.

The fact that Kann voluntarily offers this explanation is of itself sufficient to exhibit a most singular dulness of the moral sense on the part of the witness, and to show us what kind of a man we are dealing with. But his other explanation is so weak that we are led to realize the trouble he was in to explain his strange connection with a company which he claimed to be insolvent. And perhaps we may be able later on to point out who the *somebody* was with whom the negotiations were pending. Meanwhile, we will have to be content with this explanation of his holding over, unless, indeed, we adopt the second, which is to the effect that the directors were having great difficulty in getting a meeting because they were in such straits "that you couldn't get them together" (*Ib.*, pp. 481, 482)!

Be these matters as they may, Kann, by his own testimony, remained treasurer of the company two months after he knew that it was and always had been insolvent. Now, did he, as one would naturally suppose, *cease* lending money to this insolvent concern from which he was so eager to get loose, and in which he had so little capital invested? Not at all. He actually proceeded to advance them "further moneys in January and

February, 1894" (*Ib.*, p. 471), and lent them altogether "$42,500 between December and February" (*Ib.*, p. 479). This was certainly very extraordinary and would, indeed, seem foolhardy but for the fact that Mr. Kann, being apparently a very shrewd business man, who saw far ahead, was careful to take security for his loans. With the exception of the discount of the $3,500 note, with which he had opened his account with the company, the $42,500 loaned by him, was, as he testifies, "in cash, on their promise to deliver to me, and they did deliver to me, judgment notes of the company" (*Ib.*, p. 480).

But, somehow or other, the company, although insolvent, seems to have held its own, and we do not find that any other creditors were pressing it for payment. So Kann had to resort to severe measures himself. There didn't seem to be any prospect of a Receivership unless he began proceedings to collect his indebtedness. He had only lately come into the company. He had discovered, he says, that it was insolvent; nevertheless, he loaned it money, and now he enforces his judgment note and puts it in such straits that the appointment of a receiver becomes necessary. The company was evidently at his mercy, so its directors authorized the commencement of a suit to wind up its affairs. In this suit in the Westmoreland County Court the company went into the hands of Joseph W. Stoner, as Receiver, in March, 1894 (*Ib.*, p. 473). In June, 1894, the Receiver, by the order of the Court, sold the property subject to the mortgage, and Kann realized the opportunity for which he had been working. He bought in the property subject to the existing mortgage of $250,000 for $37,500, bidding it up against other bidders, and outbidding the highest bidder by $500, thus showing that he was very desirous of getting the property. He had at this time reduced his claims against the company largely to judgments. He thinks he

had a judgment for the whole amount, but as to the actual amount of the judgment he is not quite sure (*Ib.*, p. 482).

It was pretty quick work. In December Kann made his first advance of $3,500. In January he discovered the insolvency, but nevertheless advanced more. In February he enforced his securities. In March the Receiver was appointed and in June Kann was the owner of the property. Whatever we may think of him, his promptness and efficiency cannot be criticised.

The above was the condition of Kann's testimony, as it appears on the record, at the time of the filing of the supplemental bill. It will be seen that he corroborates in this testimony many of the allegations of that bill as to his connection with the mortgagor company. He himself remembers in the clearest manner that the original mortgagor company was insolvent when he first became connected with it; that he found this out almost immediately afterwards, but, nevertheless, proceeded to lend it large sums of money, reducing his claims hastily to judgments, and continuing to hold over as treasurer until a Receiver was appointed, from whom he bought the property, subject to the mortgage, for a very inadequate consideration. With the exception of Marthens, the expert, who corroborated the proof of the company's insolvency, he was the last witness called by the defense under the original bill. He had heard all the testimony of Semmer and the others, and it was to be supposed at that time that his would be the last word in the case concerning these his transactions with the original company.

But things were destined to be otherwise. The fire happened and the supplemental bill was filed. Semmer was recalled by the complainants and closely examined by them as to these very transactions. A great deal of new light was thrown upon them, but by no means in contradiction of Kann,

who had proved a very effective witness against himself. We will now epitomize Semmer's testimony just as we have done Kann's.

Semmer showed that he had personally been connected with the mortgagor company in various capacities from the beginning, and was president in 1893 and 1894. He first became acquainted with Kann in the fall of 1893, and in the beginning of 1894 Kann was elected director and treasurer (Rec., Vol. II, p. 57). This election was held on January 10th, 1894 (Rec. Vol. II, p. 59). Before Kann became director and treasurer, Semmer says, there was an agreement entered into between Kann and some of the stockholders—a verbal agreement. These stockholders were represented by Semmer and Cowen. Semmer practically handled the entire negotiations (Rec. Vol. II, pp. 57, 58), which were held in the latter part of 1893 at New York, Irwin and Pittsburgh (*Ib.*, p. 58). These stockholders, it seems, were very hard pressed for money. The panic was on, and they were looking for somebody to provide additional funds. Kann appeared with an evident desire to go into the Plate Glass business (*Ib.*, p. 58), and they finally entered into an agreement with him to give him one-third of the controlling stock provided he would furnish the company with the needed money—$100,000 was needed, certainly—and he agreed to furnish this money provided that Semmer and Cowen would assign to him one-third of their joint holdings of the controlling stock interest (*Ib.*, p. 58). With this testimony before us we begin to find out who the *somebody* was who, as Kann had testified, was negotiating for one-third of the controlling interest, and *because of whose negotiations he, Kann, consented to continue treasurer of the company, although he knew it was insolvent.*

Carrying out the agreement, Cowen and Semmer transferred to Kann one-third of the controlling interest, amounting to $86,000 in stock (*Ib.*, p.

58), and the actual stubs of the certificates so transferred and the record of the transfers on January 19th, 1894, may be seen in the exhibits offered by us on pages 96 and 97 of the Record, Vol. II. It is interesting to compare this proof with Kann's own statement already recited that he never had but *one* share in this corporation. Kann also acted in pursuance of the agreement between himself and Cowen and Semmer. He accepted "the directorship and financial management" at the annual election (Rec. Vol. II, p. 59) in January, 1894, and advanced some $38,500 in the first six weeks of his connection (*Ib.*, p. 59). *None of this was advanced before he was elected* (*Ib*). This is in strict accord with Kann's own testimony already quoted, and it will be recalled that within two days after his election, and consequently before he made these advances, as he admitted, he knew the company was insolvent.

Now, these amounts were advanced by Kann on the understanding that he was to endorse with Semmer the company's notes, receiving by way of protection judgment notes from the company. He obtained *an option from the company on the unsold preferred stock*, amounting to about $106,000, and the understanding was that, when he had paid for this stock, the proceeds of such sale should be used to pay the notes as endorsed (*Ib.*, pp. 59 and 60). Under this arrangement a judgment note for $10,000 was issued to Kann, but judgment notes were refused him as to the balance of the $38,500, because, after advancing that much, *he declined to advance any more, unless Cowen and Semmer would assign to him the balance of their stock* (*Ib.*, p. 60). Thus, Kann was gradually seeking to get absolute control of the company. A treasurer and director, with one-third of the controlling interest in the stock in hand, with an option on $106,000 preferred stock, with a judgment note for $10,000, and other claims amounting to $36,500, and with the company insolvent and in dire need of

money, he expected to be able to force these parties to hand over to him the balance of the controlling stock. This extraordinary demand was made within three or four weeks after January 10th, 1894 (Rec. Vol. II, p. 60).

Upon the refusal of Cowen and Semmer to comply with this demand, Kann entered his $10,000 judgment note (*Ib*, p. 51). The sheriff took possession on March 14th, and the directors of the company hastened to call a meeting, when it was decided that the only thing to be done was to have a Receiver appointed. The application to the Westmoreland Court for a Receiver was accordingly made. This followed immediately the entry of Kann's $10,000 judgment note. The application would never have been made but for that. "Otherwise the company was in no immediate stress, excepting the pressure brought on by Mr. Kann," says Semmer (Rec. Vol. II, p. 62). After the Receiver was appointed, Kann brought suit for the balance of the $38,500 not represented by judgment notes, seeking to reach the remaining moneys in the hands of the Receiver. *He attached, moreover, $15,000 or $16,000 of the company's money in New York, its money in the hands of its selling agent, Hutkoff, and its money in the People's Bank* (*Ib*., pp. 62 and 63).

This testimony, with Kann's own testimony already quoted, forms the most complete proof of the allegations of the supplemental bill as to Kann's proceedings in connection with the mortgagor company, which resulted in the wrecking of that company, the depriving it of its property, the prevention of the fulfilment of its covenants and obligations and the transfer of its property to himself. That he laid his plans and proceeded with a view to obtaining control of the property in one way or another, is beyond question in view of the evidence. Failing to get possession by means of a controlling interest in the stock, he had recourse to other and more drastic measures which

but await the decision of this Court to be deservedly defeated.

Kann's counsel subjected Semmer to a vigorous cross-examination, but did not succeed in shaking his testimony. The cross-examination will be found on pages 97 to 127 of the Record, Volume II. On this cross-examination Mr. Semmer testified that his arrangement with Kann was a private matter, of which the mortgagor company had only partial notice. (Rec., Vol. II, pp. 97–101). Mr. Schoyer again referred to the statement (Ex. No. 21) already mentioned by Kann, whereby, as defendants allege, an actual loss of $119,000 was changed to an apparent profit of $25,000, and cross-examined Semmer with a view to showing that, as Kann had testified, this statement had been shown him by Semmer at the time he, Kann, became connected with the company (Rec., Vol. II, pp. 106–108). We may say in passing, that this much talked of statement was a very harmless affair after all, and that the theory upon which it was drawn was proved to be perfectly accurate by the witness Marthens (Rec., Vol. I, pp. 440–471). But whether such statement was presented or not, and whether it had the effect ascribed to it or not, the fact remains that after the 10th of January Kann had full access to the books and learned that the company was insolvent, and nevertheless continued to act as treasurer and director (from which offices he has never to this day been relieved) and to advance moneys in the sum of $38,500 (Rec., Vol. II, p. 108). Attempting to shake Semmer's testimony as to the actual transfer to Kann of one-third of the controlling interest in the stock, Mr. Schoyer only succeeded in clinching Semmer's testimony in chief, which the witness repeated again and again in answer to Mr. Schoyer's questions (Rec., Vol. II, pp. 110–112).

One thing brought out by the cross-examination was a proposition made by Kann after his original

agreement with Semmer and Cowen, at Mr. Schoyer's office, by which the control of the company was to be placed in the hands of Kann at once in consideration of further advances by him. Mr. Schoyer's understanding of that proposition is set forth in the form of a question on page 113 of the Record, Volume II. Semmer, however, testified that he flatly refused to accept that proposition because it was altogether one-sided—that by it Kann was to get every advantage and Semmer and Cowen practically nothing (Rec., Vol. II, pp. 114–115, 116, 117–118, 119). "Mr. Kann," says Semmer, "kept threatening to close us up unless we would assign him the entire controlling interest of the concern" (*Ib.* p. 115). "Our directors never held a meeting for the purpose of having a Receiver appointed until Mr. Kann had entered judgment" (*Ib.* p. 127).

Now, *after Kann had heard the above testimony and for the purpose of rebutting it, he himself was called by the respondents and gave more testimony.* His former testimony already summarized by us, will be remembered in connection with this. He reiterates his election as treasurer on January 10th, 1894, and his continuance in that office "under protest" until March, when the property passed into the Receiver's hands (Rec., Vol. II, p. 140); also the fact that he examined the books and learned of the company's insolvency within a few days after his election (*Ib.* p. 142). On page 143 he says: "The only arrangements I ever had to advance any money was after I became or took the position of treasurer." This, as we have seen, differs somewhat from the facts as testified to by Semmer, *and as testified to by Kann himself on his former examination*, when he showed that his advances had begun in December, 1893. But it is another strong announcement of the fact that the bulk of his advances were made *after* he became treasurer—that is, after he knew that the

company was insolvent He admits having received the $10,000 judgment note (Rec , Vol. II, p. 143). The amount of his advances is again fixed at $38,500, exclusive of the note for $3,500, which he had discounted before he became treasurer (*Ib.* p. 144). He then states the proceedings which resulted in his entering judgment against the company on March 15th, 1894, and the appointment of a Receiver on the 19th of that month (*Ib.* p. 144–145). He obtained judgment for the rest of his claim (*Ib.* p. 145), which was entered as of March 16th, 1894 (p. 145)—and was largely satisfied, as Stoner's testimony will show, out of property of the mortgagor company other than the mortgaged property—and he bid in the property at the Receiver's sale in June for $37,500 (p. 146). When asked by Mr. Schoyer about the statements of Semmer concerning the arrangement with Kann to advance $100,000, Kann was very careful in framing his denial of the truth of those statements. Read his denials (Rec., Vol. II, pp. 146–147), and it will be seen that he only denies that arrangements to advance moneys were made "*preliminarily*"—"*before he got a resolution of the executive board of the company to give him judgment notes*"—which was in early January, 1894. His denials at this point amounted to no more than a declaration that he had been smart enough to make no advances—no promises of advances—until he got a resolution of the company to give him *judgment* notes. What he was aiming at was the security. He says that he undertook to "accept their proposition" (that is, Semmer and Cowen's proposition), if his examination of the books showed that the Company was solvent (Rec., Vol. II, p. 146). He found that the Company was *not* solvent, nevertheless, apparently, he *did* accept their proposition, for he went ahead and advanced $38,500, getting a judgment note for $10,000 of the same. "They were hopelessly and totally insolvent," he

says on the 1st of January, 1894 (Rec., Vol. II, p. 147).

On pages 148 and 149 he offers an explanation of the transfer of stock to him from Semmer and Cowen, which, according to him, was effected under the arrangement at Mr. Schoyer's office in February, 1894—the one referred to by Semmer as utterly one-sided in favor of Kann and which Semmer says was declined altogether. The preceding arrangement Kann denies. He says the arrangement of February, 1894, fell through, and that, *while he holds the stock*, he holds it only as a portion of the company's records (Rec. Vol. II, p. 149). It was stock formerly belonging to Cowen and Semmer, transferred to Kann under one arrangement or another, and yet Kann says here that he holds it *for the company*. What has the *company* to do with it? The truth is, Kann is trying here to explain his *possession of this stock*, although, as he states, the arrangement fell through. It makes no difference to us whether the agreement between Kann and Semmer, by which Kann got this stock and advanced moneys, was made before or after he was elected treasurer—at Mr. Schoyer's office or out of it—the *fact* upon which we rely and which is proved by Semmer, by Kann and by all the evidence, is that Kann *did* contract in the beginning of 1894, when he knew the company was insolvent, and when he was becoming a large creditor of the company, to get a controlling interest in the stock, and to obtain judgment notes of the company. The Court will draw its own inferences from his first allegation that he never held but one share of stock, and his subsequent admission in view of the tell-tale stubs that he held one-third of the entire issue, and from other inconsistencies between his first and second explanations.

Of course, Mr. Kann was given an opportunity to deny specifically and *seriatim* the various charges brought against him in connection with his proceedings at this time, and, of course, he thor-

oughly whitewashed himself (Rec. Vol. II, 150–154). His denials will have to be taken for what they are worth, and in comparison with the rest of the evidence.

Cross examined as to why Semmer had refused to sign any more judgment notes after the first $10,000, Kann could only say that Semmer wouldn't sign—said he wouldn't (Rec. Vol. II, p. 155). Is this more probable than the clear explanation of his own refusal given by Semmer himself?

Cross-examined as to the issue of the certificates transferred to him by Cowen and Semmer, Kann showed that the stock books were at his own office; that the certificates were in the handwriting of his own bookkeeper (p. 156). The balance of the cross-examination will be found on pages 158–164 of the Record, Volume II, and we refer the Court to it *in extenso*.

We must also leave the Court to refer to the Record for the testimony of Stoner, corroborating some of the above facts surrounding Kann's acquisition of the property (Rec. Vol. II, pp. 68–89). We have already devoted too much space to the discussion of a phase of the case which the evidence leaves without a doubt—the relations of Kann to the old company. That he wrecked that company and obtained its property at a nominal price and in pursuance of a scheme laid out from the beginning, is proved as surely as anything ever was proved. We will now proceed to show that the Penn Company is merely another name for Kann.

If no other proof of this were in the case, it would be sufficient to point to the consideration named in the deed to the Penn Company—$83,500, consisting, as Kann himself testifies (Rec., Vol. I, p. 483), of "just exactly what it cost" him; * * * "that is" (he says) "the $37,500, six per cent. interest added on to the purchase-money up to the time, plus the improvements which I had made

and paid for, they assuming * * * the unpaid portion of those contracts not paid for yet on the improvements, less $10,000."

But there is abundant proof of the identity of the Penn Company with Kann, in his own testimony.

"*I subsequently formed a corporation* known as the Penn Plate Glass Company and sold them the property" (Kann's testimony, Rec. Vol. I, p. 471).

This company, it seems, he himself "organized" about a year after he had bought the property, and he "turned over" the property to it (Rec. Vol. I, pp. 482-3), and has "managed that plant ever since it has been operated, * * * since it has been a corporation." He is "now president and manager of that company" (Rec. Vol. I, pp. 478-9).

Mr. Stoner's testimony also proves the identity of Kann and the Penn Company. Kann divulged to him his intention of reorganizing the company about six months after he had bought it (Rec. Vol. II, p. 75). Kann was a charter member, and so were all his friends—Dreyfus, Rosenthal, Kerr, Wertheimer and Stoner (*Ib.*, p. 76), the latter of whom became a charter member at the solicitation of the others, and took ten shares of the stock (*Ib.*, pp. 75-76). He subsequently parted with them, but at a price which he refused to state (*Ib.*, p. 88).

Another proof of the identity of Kann with the Penn Company is the fact that he so vigorously defended this suit. Having parted with the property, and been paid, as he declares, all he disbursed upon it while in personal possession, there could be no good reason for him to join in defence of the Penn Company unless his interests in the latter were so great as practically to identify him with it. Moreover, he, together with Mr. Wertheimer, went upon the insurance bond filed in this case whereby he obligates *himself* to pay the insurance (if the Court so decides) out of the *Penn Company's Insurance*. Indeed, it is unnecessary to

continue calling attention to the numerous proofs of the Penn Company's identity with Kann, and we shall now simply assume that it has been proved by the whole course and conduct of this suit, and shall proceed to discuss, in conclusion a few principles of law which we think bear upon the relief prayed for in the Supplemental Bill.

The principle that equity will look upon that as done which ought to be done applies perhaps more strongly in this case than in any other that has ever yet come under our attention, and we contend that there is an irrebuttable presumption that the insurance which has been effected by the Penn Plate Glass Company extends to and covers the interests of the trustee.

"It is a fundamental principle that equity imputes an intention to fulfill an obligation. The meaning of this is that when one acquires an interest in property and is under some obligation in respect thereto to another, though in acquiring the same he expressed no intention of fulfilling the obligation, equity will impute such an intention and will erect an equitable estate or interest in the subject-matter in favor of the person to whom the obligation is owing."

Beach on Modern Eq. Juris., § 24.

The complainant has no adequate remedy at law for the procurement of the relief to which it is plainly entitled. The provisions of the mortgage, when taken in connection with the manner in which the property has been acquired by the defendant, the Penn Plate Glass Company, create a clearly implied contract, enforceable in equity, on the part of the Penn Plate Glass Company, to insure for the benefit of the bondholders and the trustee. The insurance which has actually been effected by the Penn Plate Glass Company, in whatever terms the policies may be couched, must be presumed by a Court of equity to have been in fulfilment of this

obligation. And in view of the accident which has wiped out so large a part of the mortgage security, it would be a violation of good conscience for the Penn Plate Glass Company to retain the full benefit of the policies obtained by it. The trustee and bondholders should therefore be decreed in equity to have a lien upon those policies to the extent of their loss.

Accident, as is familiar to this Court, is a very ancient and well-known ground of equity jurisdiction. It means—

"an unforeseen and unexpected event occurring externally to the party affected by it and of which his own agency is not the approximate cause, whereby, contrary to his own intention and wish, he loses some legal right or becomes subject to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person under the circumstances to retain."

Beach on Modern Eq. Juris.. § 25, *note.*

It does not meet our contentions for the appellant to say that the plaintiff and the bondholders had insurable interests in the property which they might have covered by effecting insurance themselves; and that, in a suit at law upon the covenant, the damages, if any, would have been simply the cost of the insurance. This is not a suit at law, but a bill in equity, filed after the loss of the property, at a time when the insurance could not be effected by the trustee, which, moreover, never was in possession of any funds which it might have used to effect insurance.

We do not stand here as a mortgagee claiming that the covenant of the mortgagor to insure for our benefit is binding upon an innocent stranger purchasing the mortgaged property. That is not this case. We assert, and the facts set forth in the supplemental bill and proved by the evidence demonstrate the assertion, that the present owner of

this plant, the Penn Plate Glass Company, is not an innocent owner of this property, but became such owner under circumstances which estop it from denying its obligation to insure for the benefit of the bondholders, and render it inequitable that it should retain the whole benefit of the insurance effected by it upon the destroyed property. It would be a strange miscarriage of justice if such a man as the defendant Kann could with impunity, upon becoming the owner of mortgaged property by the methods pursued in this case, permit the existing insurance of the mortgagee's interest to die out, and, by reorganizing the company, and issuing new insurance in a new name, deprive the mortgagee altogether of the benefit of insurance—and this, particularly, when the loss has occurred during a protracted period of obstruction by him and his reorganized company of the mortgagee's matured right to possession of the property and a sale under foreclosure. It must not be forgotten that the principal as well as the interest upon these bonds is now due, *and has been due since the beginning of 1896*, and that the fire occurring in April of 1898, destroyed property which was *already* subjected to a *matured* mortgage debt of nearly three hundred thousand dollars, and against which the lien of the mortgage was in process of enforcement. As early as 1896 the Trustee had asked the Court to take possession of the property through a Receiver. These facts are of extreme importance. It is not as if the trustee were here asking a Court of *law* to fix the obligation of this insurance covenant upon a purchaser—even such a purchaser as the Penn Company—at a time when nothing was due under the mortgage, and before a fire had occurred, and before the lien of the mortgage had matured and was in process of enforcement. *For all equitable purposes the mortgagee was the owner of the property at the time when it was destroyed.* The title, of course, remained in the Penn Company, and would remain

there until a deed under a foreclosure sale. Indeed, the title would never vest in the mortgagee unless it saw fit to purchase at the sale. But its right, to the extent of the mortgage debt, to every dollar of *value* in the property up to the extent of its mortgage had accrued and was mature at the time of the first default. Its right to a sale matured months before the destruction of the property, and every dollar of the proceeds of sale, representing the *value* of the property, would have belonged to the mortgagee up to the amount of the mortgage debt.

The fact that a *decree* had not yet been entered cannot alter these facts. A decree does not *create* the rights of the mortgagee, it only declares them. Its effect is simply to *execute* the contract of the parties, and to enforce their several rights as they already exist. Hence, looked at from any point of view, it is impossible for the defendants to deny that the property, from the destruction of which they expect to reap such benefits in the collection of insurance, was, so far as its *value* was concerned, the property of the complainant. It is no answer to this to say that the insurance was only intended to cover the defendant's *equity* in the property. In the first place, the respondents are not proceeding on that theory, *because they are collecting the value, not of such equity as they may have, but of the entire destroyed property.* And in the next place, it must be remembered that long before the fire occurred the defendants had, in equity, as between them and the mortgagee, ceased to have any insurable interest in the property, or indeed any interest in it whatever. We cannot insist too earnestly on this point. When the defaults occurred under the mortgage, and the trustees' right to a sale of the property matured, the mortgagor immediately ceased to have any tangible interest in this property *as against the mortgagee.* The entry of a decree would add nothing to the

basic rights of the parties. And when it is further remembered that a decree would have been entered as far back as 1896 *but for the obstructive defenses interposed by the defendants Kann and the Penn Company, which they have now abandoned*, we submit, the Court should not hesitate judicially to impress the lien of the mortgage upon whatever insurance that company is entitled to. If this is not done, the Penn Company, by reason of its own unwarrantable obstruction of the foreclosure suit, will be able to collect from the insurance companies the *full value*, not simply of an equity of redemption, but of the entire destroyed property, which of right should belong to the mortgagee. But, if that obstructive defense had not been interposed, and if the foreclosure sale had preceded the fire, as it would have done but for that defense, will it be seriously contended that the equity of the Penn Company would have been worth the amount collected on the insurance, or anything like it? That Company bought subject to the mortgage with full notice of the mortgage, and is equitably entitled to obtain nothing out of the mortgaged property until after the mortgage debt is satisfied. If, therefore, this Court sustains the defense, the Penn Company will *profit* by the fire and become unjustly enriched at the expense of the mortgagee.

We submit that this consummation would be contrary to all equity, which looks at the substance of a transaction and disregards the form. The appellant seems not to appreciate that we are in a Court of equity, and not a Court of law; that we are seeking to enforce an equitable lien upon this insurance, and not suing at law upon a covenant. They assert that we must point to some contract, express or implied. There is no magic in these terms. A contract implied in law is really no contract at all. It is simply an instance of the operation of the law to prevent the working of a manifest injustice within the forms of law. In cer-

tain cases the law will compel a man to perform a duty by implying a promise on his part to perform it. One of the classes of implied contracts is well described by Lord MANSFIELD in *Moses* vs. *MacFarlen* (2 Burr, 1008), where he says:

"If the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt founded in the equity of the plaintiff's case, as it were, upon a contract—*quasi ex contractu*, as the Roman law expresses it."

The instances in which contracts are implied in law are too multitudinous to cite.

"Whenever circumstances arise in the ordinary business of life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted."

Ex parte Ford (16 Q. B. D., 307).

The equitable foundation of implied contracts is clearly expressed by Pothier in writing upon such contracts in the civil law, from which we derive the principle.

"In contracts it is the consent of the contracting parties which produces the obligation; in *quasi* contracts there is not any consent. The law alone, or natural equity, produces the obligation by rendering obligatory the *fact* from which it results. Therefore these facts are called *quasi* contracts, because without being contracts, they produce obligations in the same manner as actual contracts."

Pothier on Obligations, 113.

These authorities indicate the basis upon which is built the broad doctrine of implied contracts. Like constructive trusts, they necessarily depend on the circumstances of each case, and vary as infinitely as the transactions of men. If, then, it is necessary, in order to sustain the equitable lien of this complaint, to have some underlying *contrac-*

tual obligation, the facts in the case create a situation from which natural equity compels the implication of a *promise* on the defendants' part to hold a part of these insurance moneys *in trust* for the complainant, and to pay over the same upon the adjustment of its loss.

"That a case is novel, and not clearly within the limits of any adjudged case, does not warrant the denial of relief in equity."

Beach on Modern Equity Jurisprudence, § 1.

And in the case cited in the foot notes by Mr. Beach, p. 2, *Piper* vs. *Hoard* (107 N. Y., 73), the Court says, referring to the facts then before it:

"If the most that can be said is that the case is novel, and is not brought plainly within the limits of some adjudged case, we think such fact not enough to call for a reversal of this judgment. The spectacle of an individual enjoying property acquired by means of an admitted fraud is not one which appeals with any great force to the sympathies of a Court in a civilized land in behalf of the perpetrator of the fraud."

From the above considerations it will be seen that this bill is not filed upon the narrow contention that the covenant to insure runs with the land. We are not concerned with that question. What we do claim is that with this covenant in the mortgage; with the insurance placed by the original company in pursuance of that covenant for the mortgagee's benefit; with Kann identifying himself with the mortgagor company and bringing it to speedy destruction; with the new company nothing but another name for Kann and his interests, and taking the property with full notice of his dealings; with both these parties fully aware of the mortgage, and of its contents, refusing to insure for the trustee's benefit, and deliberately permitting the former insurance to lapse, in spite of

the demands of the trustee; finally, with these same parties improperly opposing our settled right to be put in possession through a Receiver, and also obstructing the foreclosure, so that the fire occurred before a decree could be entered, but long after the trustee's rights had matured, and while the mortgage lien was in process of enforcement—with all these facts, we have made out a claim to the insurance effected by the Penn Company without regard to whether that company *intended* that insurance to inure to the benefit of the mortgagee or not.

The ground of our claim is the equitable obligation of the defendants, growing out of their dealings with this property, and it does not in any sense rest upon the *intention* of the Penn Company or Kann. In this connection, we wish to call the Court's attention to the argument of the appellant that even insurance effected by the *mortgagor* company would not be subject to a lien in favor of the mortgagee, although the mortgage contained a covenant to insure for the mortgagee's benefit, provided the insurance policy contained evidence that it was *not* the intention of the mortgagor to take out that policy in pursuance of the covenant. The appellant refers to the case of *Dunlop* vs. *Avery* (89 N. Y., 592), in support of that argument. But that case does not support it. The Court, on this point, says in the course of its opinion:

"The rule that when the mortgagor covenants to keep the buildings insured for the benefit of the mortgagee, that any insurance that may be effected *in the mortgagor's own name or for the benefit of the mortgagor* will be presumed to be in fulfillment of the covenant is well established, *but this presumption arises only in the absence of proof to the contrary*, and this is not the legal presumption when the policy itself provides for the payment of the loss to *another* incumbrancer."

The appellant understands this to mean that the presence of proof that the insurance was intended

by the mortgagor to cover only his *own* interest, *defeats* the presumption of law whereby the insurance is taken to be for the benefit of the mortgagee and a lien in the latter's favor is impressed upon it.

But a moment's reflection will show that that cannot be the meaning of the Court. In the first place, the *Avery* case was a fight between *two incumbrancers*—not between an *incumbrancer* and the *mortgagor*—in which the senior incumbrancer was seeking to wrest from the junior, insurance which the *mortgagor* had effected—not in its *own* name—but in the name of the *junior* incumbrancer. The mortgagor was under covenant to both incumbrancers to insure for their benefit, and it would clearly have been inequitable to give to the first incumbrancer insurance which was in terms the property of the second. That is what the Court held, declining to indulge the presumption above referred to "when the policy itself provides for the payment of the loss to *another incumbrancer.*" The Court does not say that the presumption would not be indulged if the policy provided for the payment of the loss to *the mortgagor.* On the contrary, that is the precise case in which the Court says the presumption *does* hold. The rule is well established, it says, when the insurance is effected "in the *mortgagor's* own name, or for the benefit of the *mortgagor.*" And this must, undoubtedly, be the rule; for, otherwise, it would be meaningless. There never would be a case in which the mortgagor could not adduce evidence that he intended the insurance to be for his *own* benefit, and not for the benefit of the mortgagee. The foundation for the rule is that *equity* requires such insurance to be impressed with a lien in favor of the *mortgagee.* The *Avery* case refers to and rests upon the case of *Cromwell* vs. *The Brooklyn Fire Insurance Company*, 44 N. Y., 42, in which the Court, alluding to this old established doctrine, says, p. 47):

"Where the assured has agreed to insure for the protection and indemnity of another person having an interest in the subject of the insurance, then such third person has an *equitable lien*, in case of loss, upon the money due upon the policy to the extent of such interest. These are principles of law well settled."

To claim, as the appellant claim, that the mortgagor can escape from the effect of this equitable lien by simply declaring that the insurance is limited to his *own* interest, is to deprive the rule of all efficacy—indeed, to do away with it altogether, and to permit the mortgagor to destroy the obligation imposed by equity upon him simply by denying the existence of that obligation.

In *Wattengel* vs. *Schultz* (11 Misc. 165), which, like the present case, was a foreclosure suit, a mortgage contained a covenant to insure and to assign the policies to the mortgagee. The mortgagor insured the property, but his policies were afterwards canceled and he died. Thereupon his administratrix took out new policies payable to the estate of the mortgagor. The property burned down and the insurance companies paid the insurance moneys to the administratrix of the mortgor. "The deceased did not assign the policies taken out by him to the plaintiff nor was there any reference therein to the plaintiff's mortgage, nor did the plaintiff avail himself of the right given him in the insurance clause of the mortgage to insure the buildings for his own benefit." Upon default, the foreclosure suit was brought and, among other things, the plaintiff prayed as relief "to have the lien of the mortgage declared upon the insurance moneys in the hands of the administratrix and have the same applied upon the plaintiff's mortgage."

It was argued among other things that the plaintiff had been negligent because of his failure to insure his own interest. But the Court granted the relief prayed :

"The administratrix has money that represents the real estate destroyed that was subject to the lien of the plaintiff's mortgage. * * * The husband's covenant to insure the premises, if not performed in his lifetime, can be enforced against his estate through his personal representatives to the extent of his assets in their hands. * * * In insuring a mortgage interest it *is not the debt* secured by the mortgage that is insured but the interest of the mortgagee in the property upon which his security rests. * * * And the proceeds of the insurance is to be distributed, when upon real estate, *as real estate*, and not as personal property. * * * The administratrix had the right to execute the covenant of the deceased, and it was her duty to do so, and when she took out the four policies *in the name of the deceased and of his estate*, the presumption is that she did it in the performance of that covenant, and as a continuation to the extent thereof of the insurance that had been effected by the deceased."

In *Cromwell* vs. *The Brooklyn Fire Insurance Company*, already cited, the owner of property agreed to sell it to another, the purchase price to be paid partly in cash and partly by mortgage, it being that the vendee should insure the property and assign the policy to the vendor to protect his vendor's lien. The vendee took possession and insured the property in his own name, loss if any payable to the vendor. But this insurance having come to an end, he renewed the insurance, *with the some company making the loss payable to himself only*. After a fire had destroyed the property, the assignee of the vendor served notice of his claim to an equitable lien on the insurance moneys on the insurance companies which, in spite of the notice, paid over the moneys to the assured (the vendee). In an action against the insurance company brought to enforce the equitable lien of the vendor on the insurance, the Court sustained the lien, and compelled the insurance company to pay the loss *over again* to the vendor's assignee.

"The plaintiff," said the Court, "notified the

company of his equitable lien to the insurance money before payment to Eichenlaube (the vendee). After such notice the company made the payment at its peril. * * * The company assumed the hazard of resisting the equity claimed by the plaintiff. * * * This claim does not operate as an assignment of the policy, against which the company by a condition of that instrument stipulated. They became, *by reason of the facts*, and the notice given by Cromwell, *trustees of a fund which they were equitably bound to pay to the party justly entitled*. The party entitled in this case was the plaintiff" (the vendor's assignee).

These cases show that even under the most unusual circumstances, where no doubt could exist that the assured was claiming the full benefit of the policies and seeking to deprive the mortgagee of them altogether, the Court will nevertheless presume that the policies inured to the benefit of the mortgagee and impress his equitable lien upon them.

The case of *Louden* vs. *Waddle* (98 Pa. St. 242), has not the slightest application to the present controversy. There was no question of covenants to insure in that case—it was not even a case of insurance effected by a mortgagor. The fact before the Court in *Louden* vs. *Waddle* were these: Certain administrators mortgaged a piece of real estate to their intestate's widow. She thus became *mortgagee* of a piece of property in which she also had a dower right. *She* insured her interest in this property and upon a loss collected the insurance. The question was whether this insurance could be considered as covering the mortgage debt as well as the estate in dower, so that the mortgage could be regarded as paid by the payment of the insurance. How such a case can be cited as an authority in the present discussion we are at a loss to understand.

The case of *Stearns* vs. *Quincy Insurance Company* (124 Mass., 61), does not conflict with the above authorities and reasoning. That was a case

of a covenant in a mortgage which made it incumbent upon the mortgagee to examine and approve the insurance effected for his benefit by the mortgagor. It contemplated action by the mortgagee. But the latter appears to have made no inquiry whatever and, indeed, to have had no knowledge of the existence of the insurance at all, until after the loss. Moreover, the condition required that the insurance effected for the benefit of the mortgagee should be for a sum not less than $3,200 (page 64), and the insurance actually taken out by the mortgagor was for only $2,500, only $1,500 of which covered property covered by the mortgage (page 64). All these facts were recited by the Court and its opinion was expressly based upon them. They make it clear that the mortgagor, in taking out the policies, was only insuring his equity—his own interest in the property—and it would have been plainly inequitable to permit the mortgagee, who had neglected to inquire or to protest or to make any attempt towards the fulfillment of his part of the condition, to seize insurance which was certainly not more than was adequate to cover the mortgager's own interest. In all these respects the case is directly opposite to the case at bar. Moreover, *Stearns* vs. *Quincy Insurance Company* was not a *cause in equity*. It was an action at law on contract, and the action was brought by the mortgagee *in the name of the mortgagor* on the theory that there had been an equitable assignment of the insurance. In deciding the case the Court took this ground for denying the plaintiff's remedy :

"Assuming that Andrews (the mortgagee) has an equitable claim to that part of the policy which covers the house," said the Court, "yet it is one which he cannot enforce in a suit at law on the policy in the name of Stearns, the mortgagor, because the latter must have an equal right to recover his share in such an action, and the company would be required to pay one loss by instalments

to different persons and be subject to two suits for the same cause of action, in favor of the same plaintiff."

No such objection can be made to the pending suit, which is upon a bill in equity and all of the parties are before the Court and the relief prayed is cast puposely in a form which will do equity on all sides.

The general rule referred to is well stated in *Wheeler* vs. *Insurance Co.*, (101 U. S., 439) at page 442), where the Supreme Court of the United States says:

"It is settled by many decisions in this country that if the mortgagor is bound by covenant or otherwise to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor to the extend of the mortgagee's interest in the property destroyed. * * * And this equity exists, although the contract provides that in case of the mortgagor's failing to procure and assign such insurance, the mortgagee may procure it at the mortgagor's expense."

From the above authorities, it is clear that if the insurance policies which have been taken out by the appellant, the Penn Plate Glass Company, had been taken out by the original mortgagor, the Pennsylvania Plate Glass Company, the complainant would unquestionably have had an equitable lien upon them to the extent of the loss under the mortgage.

But the appellant claims that this equitable lien does not exist as against policies taken out by the Penn Plate Glass Company, and they found that contention on the doctrine that the covenant does not run with the land. By this they mean that the facts from which equity would draw the right of the mortgagee to a lien on insurance effected by the Pennsylvania Plate Glass Company do not exist where the insurance was effected by the Penn

Plate Glass Company. But inasmuch as the whole lien, whether against mortgagor or some third person, rests upon *equitable* inference, it follows that if a *state of facts* exists from which it would be *equitable* to infer a right in the mortgage to a lien on the insurance, that lien will be inferred and impressed upon the insurance, whether the covenant does or does not run with the land. If, as we have endeavored to show, the assured bought subject to the mortgage and with a full knowledge of the insurance covenant and of the mortgagor's then existing fulfilment thereof, and bought and held the property under circumstances which in equity deprive it of the right to stand as a *bona fide*, innocent purchaser, and confound it, so to speak, with the original mortgagor itself, then equity must step in, just as in the case of the mortgagor's insurance, and for the same reason, and must impress upon the insurance a lien in favor of the mortgagee.

The case is clearly distinguishable from the case of *Reid* vs. *McCrum* (91 N. Y., 412). In that case, the assured was the innocent owner of the property, absolutely a stranger to the original ownership. He had obtained the property through a number of mesne conveyances, and had no connection with the mortgagor. There were present none of the circumstances which, in the present case, identify the assured with the mortgagor and make it as inequitable for the former as for the latter to deny the lien of the trustee. Moreover, as appears from the statement of facts in the McCrum case (page 413) the fire had there occurred *previous to the foreclosure*, and not, as here, long after the foreclosure was begun and was being obstructed by the defendant. The significance of the fact that the trustee's mortgage lien had already matured before the fire in this case has been amply discussed in preceding portions of this brief, and its effect upon the equities points out a broad ground of distinction between this case and that of *Reid* vs.

McCrum. That case, however, was argued on behalf of the mortgagee on the theory that the covenant to insure ran with the land, and it was because the Court took an opposite view on that bare point that the mortgagee's contention did not prevail. Here, we do not in any sense rest our claim on the theory that the covenant runs with the land, and the two cases are wholly different. The Court, in *Reid* vs. *McCrum*, referred to *Dunlap* vs. *Avery*, already quoted above on another point, and held that that case decided that a covenant to insure does not run with the land, and that, therefore, the matter was *res judicata*, "*unless some reason exists why the case cited should not be followed and adhered to.*" Reference to the *Avery* case would not seem to support the view taken of it in the *McCrum* case, that it definitely decided that such a covenant does not run with the land; but, however that may be, the Court, by the above quoted expression, expressly recognizes that there might arise a state of facts upon which it would not be proper to follow the ruling that such a covenant does not run with the land. That such a state of facts exists here we contend, claiming that while, as against a stranger purchasing this property, that covenant might have no effect, it bound the Penn Plate Glass Company, which was no stranger, but stood in the shoes of the Mortgagor Company, with even less equity as against the mortgagee than the Mortgagor Company itself possessed.

IV.

By the Terms of their Purchase, and under the Circumstances of this Case, the Defendant Kann and the Appellant bought subject to the Mortgage and assumed the Mortgage-Debt, or, at least, agreed to indemnify the Mortgagor against any Liability upon the Covenants of the Mortgage; and the Court below, having Jurisdiction of the Res and of the Parties, had Power, in order to prevent Circuity of Action, to enforce this Obligation by the Decree now appealed from.

We now come to another ground upon which we contend that the decree should be sustained, wholly separate and apart from the grounds already advanced. The principles upon which we have relied in the foregoing points of our brief have had nothing whatever to do with the question as to the assumption of the mortgage debt by the purchaser, or the reciprocal obligations of the mortgagor and the appellant. In the present point, for the first time, we take up and discuss the case in that aspect.

The sale of the mortgaged premises to Kann by the Receiver Stoner on June 18th, 1894, was, as we have shown, made subject to the lien of the existing mortgage for $250,000; and the deed given to the purchaser on July 2d, 1894, recited that it was made "subjected to a mortgage made by the said Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of the City of New York for two hundred and fifty thousand dollars ($250,000), dated Jan. 1, 1891, recorded in Westmoreland County, in Mortgage Book 43, page 1."

One year later, and on July 1st, 1895, Kann conveyed the property to the appellant by deed, which recited that it was made "subject to a mortgage made by the Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of the City of New York, for two hundred and fifty thousand dollars ($250,000), dated January 1, 1891, recorded in Westmoreland County in Mortgage Book 43, page 1."

It has already been pointed out that the considerations for which these two conveyances were made were $37,500, and $83,500, respectively. And it is admitted in the answer, as alleged in the supplemental bill, that both Kann and the appellant had, at the respective times when they purchased this property, not only the constructive notice given by the explicit mention of the mortgage in their deeds, but full, actual and complete notice of all the provisions, covenants and stipulations of the mortgage, including those relating to insurance.

At the argument before the lower Court, the appellant and Kann asserted that in spite of these facts they could hold the mortgaged premises free of the lien of the mortgage. This contention they have now abandoned, and they acquiesce in that part of the decree which directs a sale of the remnants of the mortgaged premises for the benefit of the bondholders. But they still deny that the terms of their purchase, or their actions after coming into possession, have raised any obligation upon their part upon or under the covenants in the mortgage. They deny that they ever assumed the mortgage debt, or that any obligation under the covenant to insure ever arose against them to indemnify the mortgagor in case it should become liable on that covenant. The object of this point of our brief is to show that they are wrong in those denials.

We agree with counsel for the appellant (Brief,

page 61), that for the purposes of determining the contract into which these parties have entered, the laws of Pennsylvania govern. Hence, those cases which in other jurisdictions distinguish the expression "*subject to a mortgage*" from the expression "*subject to the payment of a mortgage*" do not apply. The Courts of Pennsylvania, very properly, we think, draw no such distinction.

Blood vs. *Crew Ledick Company*, 171 Pa. St., 328.

Moreover, it must be remembered that this is not a case of an individual's mortgage upon a piece of land, the sale of the equity in which would leave the mortgagor fully as competent to meet the mortgage-debt as he was before such sale. We have here a mortgage made by a *corporation*, not merely upon a piece of land, but upon land, machinery, franchises, rents, issues and profits—in short, upon the entirety of the corporation –upon its whole property and stock in trade, owned at the time of the mortgage, or thereafter to be acquired (Rec. Vol. I, p. 24). And the sale of the equity of redemption at which Kann purchased, was not an ordinary sale by an individual, but a judicial sale, of all the property of every conceivable kind belonging to that corporation made in a proceeding to wind up the corporation's affairs and to put it out of existence. The necessary effect of such a sale is utterly to wipe out the mortgagor corporation, and to destroy, if not its legal existence, at least all its capacity to do business, to raise money or to pay its obligations. And one who knowingly, and with full notice of all the circumstances, purchases subject to such a mortgage, or at such a sale, can hardly be regarded as standing towards the vendor, or the mortgagee, in the same position as a mere individual purchasing at an ordinary sale subject to an individual's mortgage. The act of such a purchaser of corporate property must obviously

result in depriving the mortgagee of all hope of collecting his mortgage debt from the mortgagor. It must deprive him, moreover, of all hope of receiving the interest on his mortgage out of the income of the plant, except at the will of the purchaser. And if that purchaser is at liberty so to apply the income or not at pleasure, without running any other danger than that of having the property subjected to a foreclosure suit, the door would be opened to very great and very probable wrong to the mortgagee. For the purchaser, safe from personal liability, could mismanage the property at will, absorb its income, leave it unprotected and useless, and then be content to suffer the mortgagee to step in and seize the mere wreck of his security. Such certain evils should never be allowed to occur *in invitum*. The mortgagee is powerless to prevent them. He must stand aside—see his mortgagor swept aside—his security thrown into irresponsible hands—and do nothing. It will readily appear to the Court that, under such circumstances, the implied undertaking of a purchaser subject to a mortgage at such a sale must be vastly greater and more binding than in an ordinary case. It cannot be lightly assumed that the Court of Westmoreland County intended, when winding up this corporation and selling its property subject to an acknowledged mortgage, to work such injustice to the mortgagee.

We think it therefore clear that the appellant, by purchasing subject to the mortgage, took the property subject to an implied covenant on its part to indemnify the mortgagor against any liability to which it might be subjected by reason of the mortgage; and that, inasmuch as by the very terms of its purchase, it knew that the mortgagor was thus rendered powerless for all time to meet such liability, it practically, by purchasing subject to the mortgage, *expressly* agreed to pay the mortgage debt.

Even in the case of ordinary purchases subject to a mortgage, or to the payment of a mortgage, the law in Pennsylvania has always been that by such purchases the vendees at least impliedly agree to indemnify the vendors against liability on the mortgage.

Campbell vs. *Shrum*, 3 Watts, 60;
Blank vs. *Garman*, 5 W. & S., 42;
Woodward's Appeal, 38 Pa. St., 327;
Moore's Appeal, 88 Pa. St., 452.

For a long time a controversy pended in the Courts of Pennsylvania as to whether in every case of a purchase subject to a mortgage the transaction did not import *something more* than this indemnity; and some authorities held that such purchases *ipso facto* gave rise to an implied covenant, *enforceable by the mortgagee*, to pay the mortgage debt. The last word in this controversy, before it was terminated by the Pennsylvania Act of June 12th, 1878, P. L. page 205, was said in the case last cited above, *Moore's Appeal* (88 Pa. St., 452), which, though decided in 1879, adjudicated claims which arose prior to the passage of the act in question. In that case the Court said:

"An examination of the cases which have been decided on the legal effect of such a clause in a conveyance, shows, we think, that *unless there exist special circumstances to raise a covenant to pay the encumbrance*, it amounts only to an indemnity to the vendor."

And, arguing against the implication of any more extended covenant, the Court said further:

"*Surely something should appear to create the inference of such a covenant.* The words, 'under and subject,' import no such thing. They import that the vendee takes the land incumbered, and at most, that in taking it at an agreed consideration which includes the incumbrance, he will indemnify the vendor to the extent of that consideration in the same manner as if it had been paid in cash and so applied at the time."

Thus, then, something *might* appear—*special circumstances might exist*—to raise a covenant to pay the incumbrance. We have already pointed out, both in this division of our brief and in prior divisions, a number of *special circumstances* which tend strongly to raise such a covenant from the purchase subject to our mortgage.

Now, when the act of 1878 was passed it is very plain that its object was to put a quietus upon all this controversy about the meaning of the bare expression "subject to a mortgage" in a deed of the equity. And to use the words of Judge BUFFINGTON (Rec., Vol. II, p. 183) the act "provided that the under and subject clause *alone* should not be construed to create a personal liability for the debt, that is a direct assumption to the owner, but left unaffected the implied covenant to indemnify, as between vendor and vendee."

The language of the act makes it apparent that this was its sole object:

"Grantees of real estate which is subject to ground rent or bound by mortgage or other incumbrance, shall not be personally liable for the payment of such ground rent, mortgage or other incumbrance unless he shall, by an agreement in writing have expressly assumed a personal liability therefor; or there shall be express words in the deed of conveyance stating that the grant is made on condition of the grantee assuming such personal liability therefor; *Provided*, that the use of the words "under and subject to the payment of such ground rent, mortgage or other incumbrance shall not *alone* be construed so as to make such grantee personally liable as aforesaid."

The appellant's counsel argue strenuously that this act completely demolished not only the inference of the assumption of the mortgage debt claimed by some authorities to arise from the words "subject to a mortgage," *alone*, but also the inference of an agreement to indemnify the mortgagor against liability on the mortgage. We

have, however, shown the origin of the act springing from the midst of the controversy mentioned. And the above quotation, when compared with the passages quoted from *Moore's Appeal*, shows that the same idea was uppermost in the minds of the Legislature which swayed the Court in that decision, namely, that while the covenant as to indemnity between vendee and vendor must always be inferred from the bare words "subject to a mortgage" contained in a deed of the equity, yet, those words *alone*, that is, in the absence of *special circumstances*, should no longer be construed by any authority to imply a covenant to assume the mortgage debt. Under the act, as before its passage, the indemnity covenant must always be inferred; under it, as before, when *special circumstances* exist, the covenant to assume the mortgage debt may still be implied; but unless such special circumstances exist, the words "subject to the payment of the mortgage" or their equivalent are not *alone* enough to imply a covenant to assume the mortgage debt. That this is the effect of the statute is to be gathered from the decisions in *Lennox* vs. *Brewer*, 160 Pa. St., 193, and *Blood* vs. *Crew Ledick Co.*, 171 Pa. St., 339. In the latter case the question squarely arose whether the Act of 1878 would prevent the enforcement of the implied covenant of indemnity against the vendee at the suit of the vendor, and the Court held that it would not:

"The Act of 1878 plays no part in this case. *The action is not brought by the holder of the mortgage to assert a personal liability against the vendee.* and for that reason the act does not apply."

IT FOLLOWS FROM THE ABOVE CONSIDERATIONS THAT IF THE SPECIAL CIRCUMSTANCES OF THIS CASE ARE SUCH AS WE CLAIM THEM TO BE, THE LAW WITH THEIR HELP WILL IMPLY FROM THE PURCHASE

OF THE PROPERTY SUBJECT TO THE MORTGAGE A COVENANT ON THE PART OF THE APPELLANT TO PAY THE MORTGAGE. IF, ON THE OTHER HAND, THEY ARE NOT SUCH AS WE CLAIM THEM TO BE, THEN THE LAW WILL STILL IMPLY A COVENANT ON THE PART OF THE APPELLANT TO INDEMNIFY THE MORTGAGOR AGAINST ALL LIABILITY ON THE MORTGAGE.

Now, with one or the other of the above-implied covenants certainly in existence, can it be successfully contended that, under the circumstances of this case, the liability of the vendee did not extend to the mortgage-provision as to insurance? We have already seen how that provision was only one of a number of stipulations contained in the mortgage for the better securing of the debt and enforcing of the mortgagor's liability upon it.

"The duty to insure," to quote from the opinion of the Court below, "was incidental and supplemental to the mortgage debt. Its purpose was to make it more secure and insure the payment. As was said by the Supreme Court in *Miller* vs. *Aldrich*, 31 Michigan, when speaking of the relation of a covenant to insure to the mortgage: 'Chapman had bound himself to afford Miller security supplementary to and connected with the mortgage. The mode agreed on had reference to the mortgage buildings, and was to be of a nature to keep the mortgaged property itself so far intact as a means of security to perpetuate the safety of the mortgagee's interest in case the buildings should burn. This stipulation was in equity a sort of adjunct to the mortgage, and was binding on Chapman and on all others in his shoes with notice. Now if by acceptance of the deed the purchaser agreed to indemnify the vendor against the mortgage debt" (or to assume the mortgage debt) "shall he *not much more* be deemed to have assumed every incident which was made a supplemental, additional, covenantal means of ensuring the payment of such mortgage debt."

This becomes the more clear when the provisions of the mortgage are recalled. By those provisions, the possession of the property is made to depend upon the fulfilment of the covenants, stipulations and agreements of the mortgage. These include the covenant to insure. For a default in any one of these covenants, the mortgaged property becomes forfeited to the mortgagee, without regard to whether the property is still in the hands of the mortgagor or sold to a purchaser subject to the mortgage. The right of the appellant to hold the property as against the mortgagee depended upon the fulfilment of the covenant to insure by the mortgagor. Can it be said, with such a provision in the mortgage, that the purchase of the property under circumstances which the purchaser knew must forever prevent the mortgagor from fulfilling that covenant, did not contemplate the inclusion of that covenant in any liability which the purchaser assumed?

The appellant's counsel seek to overcome the obvious force of these considerations by pointing (Brief, page 99) to *a part of* Article Fourth of the mortgage. Had they quoted the whole of that article, the fallacy of their argument would have been apparent in their own pages. We will here quote the entire article:

"ARTICLE FOURTH.—At any sale of the aforesaid property, or any part thereof, whether made by virtue of the power of sale hereby granted to the said trustees, or any other power of sale heretofore or hereafter granted or given by the said party of the first part, or by or under any judicial proceedings whatsoever, the said trustee, or any committee of bondholders chosen and appointed for that purpose, if requested so to do by the majority in value of the said issue of the bonds then outstanding and unpaid, may bid for and purchase, or cause to be purchased, the property so sold, or any part thereof, on behalf of all the holders of the bonds hereby secured, and then outstanding and unpaid, in the proportion of the respective interests of such bond-

holders, at a reasonable price, if but a portion of the property be sold, or if it all be sold, at a price not exceeding the whole amount of such prior liens and incumbrances as may then stand charged upon and against said premises, together with the amount of the principal of such bonds then outstanding and unpaid interest thereon, and the costs and expenses of the sale, and of the suit under which such sale shall be made, and in that case the said Trustee, or the said committee of bondholders, as the case may be, after purchasing and acquiring the title to the said property of the party of the first part and premises at and under such sale, shall reconvey the said property and appurtenances and franchises to such new company, and at such time, and upon and under such terms and provisions as may be agreed upon and fixed in writing, by a majority in value of the holders of the principal of the bonds secured hereby, and then outstanding and unpaid.

"It being expressly understood and agreed by and between the parties hereto, and by and between the said parties of the first part, and the respective holders of the said several bonds, collectively, that no other suit or proceeding for the collection of any part of the principal or interest represented by the said bonds and coupon, shall ever be commenced or prosecuted, either against the party of the first part, or any of its officers, directors or shareholders, either by the said holders of the said bonds or coupons, or any of them, or by any person or corporation to whom the same, or any of them, may be assigned or transferred, except such suits or proceedings, as shall be necessary to recover the possession of the said premises hereby conveyed, or to subject the same to the payment of the said debts, and that the sale of the said mortgaged premises, whether under the power of the sale hereby granted, or any other power of sale, or by or under any judicial proceedings whatsoever, shall operate as a full and complete satisfaction and discharge of the indebtedness of the said party of the first part, upon the said bonds and the coupons accompanying the same, and of the obligation of the covenants herein contained, whether the said premises shall be bidden in for the whole amount of the said indebtedness or for a less price, anything in the said bonds and coupons or therein contained, to the contrary thereof notwithstanding."

The meaning of the above clause in the mortgage is plain. It takes away the right of the *bondholders* to bring suits upon the bonds when once the powers of the mortgage for the enforcement of the security have been fully exercised by the Trustee. In other words, when a sale of the mortgaged property shall have taken place, the right of bondholders to sue *on the bonds* shall cease. But until such sale shall take place, the right to collect the face value of the bonds with interest necessarily resides in every bondholder. No sale having taken place, Judge Buffington was clearly right in disregarding this provision of the mortgage (Record, Vol. II, p. 181). But even if a sale had occurred, we submit that Article Fourth would not and could not have the effect attributed to it by the appellant's counsel. They argue that by this clause all personal obligation on the mortgage debt was done away with. But it is inconceivable that bonds should be outstanding, which by their terms bind the obligor to pay a debt evidenced by them, and yet be devoid of any obligatory force. And it is equally inconceivable that there should exist a *security* for a debt, such as a mortgage must necessarily be, and yet there be no debt to secure. By the terms of the mortgage the parties may, if they please, restrict or do away altogether with the *remedies* for breach of the covenants of the bonds and mortgage, or either of them; but it is impossible, in the nature of things, for them to destroy the *obligation* of the bonds so long as the bonds themselves endure or the mortgage continues to be a mortgage.

Now, this reflection is a very important one. For the appellant's counsel, in arguing from this clause, overlook the distinction between the obligation—that is, the liability on the debt—and the enforcement of that liability. We might concede the impossibility of enforcing such liability (which we do not concede, however,) without im-

pairing the liability itself. The situation, in such case, would be precisely similar to the situation of a cause of action barred by a statute of limitations. The cause of action would still be intact and entire; its enforcement alone would be frustrated.

The importance of this distinction lies here: that in the present case there is no attempt to *sue upon the bonds*, which is the only remedy prohibited by this restrictive clause. The appellant's counsel say that as there is no personal obligation on the mortgagor's part to pay the mortgage debt there can be no implied covenant on the part of the purchaser of the equity either to pay the mortgage debt, or to indemnify the mortgagor. The error of this argument is made manifest, we think, by the above distinction, and lies in the assumption that because one of the remedies of the obligee may be restricted, or destroyed, the personal obligation on the bonds has terminated. There *is* such a personal obligation still resting on the mortgagor, and hence there is no such difficulty about the inference of a covenant as the appellant's counsel assume.

But our adversaries may say: Of what value is this obligation, if it cannot be enforced? To this we answer that we are not seeking to exercise that remedy which, allowing the utmost to the other side, this provision prohibits. No bondholders are here seeking to enforce the personal liability on the bonds, nor indeed is the trustee—to whom, by the way, the clause in question does not extend—seeking to do anything of that character. But what we are trying to do is to enforce, on behalf of the trustee, and in a Court of equity, *the covenant as to insurance*, which is not in any sense the covenant to pay the mortgage debt. Undoubtedly, as we have argued above, that covenant to a very great extent flows out of the prior obligation to pay the mortgage debt. But it flows as much out of the necessity to protect the security of the mortgage. The obligation

to pay the bonds might exist without the mortgage, the covenant to insure never could. While closely connected, the two obligations are nevertheless several and distinct, growing out of the same *debt*, to be sure, (a debt which, as we have shown, still exists in spite of the Fourth Article), but requiring different *remedies* for enforcement. Hence Article Fourth has no application whatever to proceedings, either direct or indirect, upon the covenant to insure, and cannot affect the duty of the Court to imply a covenant to insure on the part of the purchaser, or at least a covenant to indemnify the mortgagor against all liability upon the covenant to insure. The plain truth is that, upon the transactions of this case, the purchaser assumed the whole mortgage. It simply stepped into the shoes of the mortgagor, and is liable upon any covenants upon which the mortgagor was liable. We assert that this liability is direct, as between the appellant and the mortgagee, because of the *special circumstances* already discussed. But if the Court should differ with us on that point, we still insist that the appellant is liable on these covenants by virtue of the implied covenants of indemnity as between it and the mortgagor.

If the Court should adopt the first of these positions nothing more need be said. The liability of the appellant being direct upon the covenant to insure, we have shown in a prior part of this brief the equities which entitle the complainant to receive the proceeds of the appellant's policies to the extent of the mortgage.

On the other hand, if the Court should adopt the second of the above positions, then it would still seem clear that the obligation upon the implied indemnity could be enforced in this suit. In that view of the case the proposition which would govern is so well stated by our opponents in their brief (page 95) that we quote it here :

"The purchaser of land subject to a mortgage who assumes and agrees to pay the mortgage debt, becomes as between himself and his vendor the principal debtor, and the liability of the vendor as between the parties to the deed of assignment is that of surety. If the vendor pays the mortgage debt he may sue the vendee at law for the money so paid. In equity, a creditor may have the benefit of all collateral obligations for the payment of the debt which a person standing in the situation of a surety for others holds for his indemnity; and upon the application of this principle, the mortgagee may enforce against the grantee of the mortgagor a personal obligation which the grantee has entered into with the mortgagor to pay the debt.

133 U. S., 624–625.
Fuller vs. *Hughes*, 12 N. Y., 79."

It is no answer to this point to say, as the appellant's counsel do in their brief, that there has been no breach of the covenant of indemnity. We have already pointed out that the appellant necessarily knew when it bought this property that by that very purchase it was certainly depriving the mortgagor company for all time of the power to carry out the covenants of the mortgage or to pay the mortgage debt. To have sued the mortgagor company upon the covenant to insure would have been the most idle farce. What property has the appellant left to the Pennsylvania Plate Glass Company with which that company could meet a judgment obtained in such a suit? To require such a suit as a preliminary to the present proceeding would be a travesty on justice. The result is as certain to-day as if the action had been brought and ended; and the procedure by which the mortgagor and the appellant have been joined together in this one suit is manifestly the right one. Nor is it conceivable that the complainant should be compelled, before insisting upon its claim to the insurance, to complete the foreclosure and sell the remaining property; that property is now but a remnant. It needs no auction sale to prove that

the mortgage debt will never be satisfied out of the proceeds of the sale. Moreover, the decree is carefully drawn to subject the proceeds of that sale primarily to the mortgage debt; and it is only in the event of that fund's proving insufficient that under the decree the insurance is to be drawn upon at all. Suppose the trustee had already procured a sale in foreclosure of the remaining property; suppose it had thereafter brought suit against the mortgagor for the balance of the mortgage debt, and obtained an uncollectible judgment in that case. In what way would there be any actual change from the present situation, where we *have* a decree of foreclosure and sale with the mortgagor company before the Court, and the insurance fund subjected only to the excess of the mortgage debt over the proceeds of the foreclosure sale? Nothing would have been added to our cause of action by such proceedings, and the Court would be in no better position than it now is to administer the equities among the parties. All those parties are here, the property is here, the insurance fund is here. The mortgagor company is known to be paralyzed and penniless, thanks to the purchase of all its property and franchises by the appellant. The result of a suit against the mortgagor company has been certain from the beginning and made so by the very act of the appellant whereby it took the property subject to the mortgage.

The balance of the argument is forcibly stated by Judge BUFFINGTON, in his opinion, and we quote it below:

"The proofs show that request to insure was duly made by the trustee upon the mortgagor and upon the subsequent purchasers which request was not complied with. It would therefore seem that by such failure to insure there was a default and a direct liability of the mortgagor to the trustee upon the covenant to insure and there was a default and a liability of the subsequent purchasers to the mortgagor upon their agreements to indem-

nify. Such requests were made in writing more than six months prior to the filing of the bill. Default having continued more than six months it became such a breach as warranted the trustee in either taking possession, selling at non-judicial sale or maintaining foreclosure proceedings.

" After the bill was filed, a demand upon these parties to insure was also made at bar by counsel for the trustee at the time of the application for a Receiver to take possession of the mortgaged premises as we have noted above.

" Under the facts it would seem that a Court of equity having jurisdiction of the subject matter and of all parties, had power to, and to avoid circuity of action, would direct ths purchaser to insure for the benefit of the trustee.

" This Court had jurisdiction of the mortgage and therefore of the mortgagor and mortgagee. Kann and The Penn Plate Glass Company, who had bought subject to it, were also parties. The question of insurance, with the determination of the several rights or obligations of all parties in reference thereto were kindred and germane to the foreclosure, and therefore to the principal subject of jurisdiction. The principle is clear that where equity jurisdiction has once rightfully attached to a controversy it will be made effective for the purpose of complete relief and to dispose of all incidental and germane questions. Fetter on Equity, page 13; Winton's Appeal, Pa. St., 97, P. 395; Allison's Appeal, 77 Pa. St., 227; McGowan *vs.* Remington, 2 Jones, 63; Souder's Appeal, 57 Pa. St., 498; Soucher's Appeal, 104 Pa. St., 615. The Trustee having exercised its right of requiring insurance, the mortgagor being insolvent, the purchaser being in possession and enjoyment of the premises, and all parties before the Court, it would seem clear to us that a Court of Equity, by its very nature constituted with plastic power to secure direct results, and in pursuance of its principle of avoiding circuity of action, had the right to order and decree that the purchaser should place insurance upon the property for the benefit of the trustee. A Court of Equity having original iurisdiction to compel specific performance of a contract to indemnify.—Chamberlain *vs.* Brown, 6 Blackf., 490; Champion *vs.* Brown, 6 John. Ch. Rep., 398, Fry on Specific Performance (3 American Edition) p. 704,—its

jurisdiction and power to do so in this case where the covenant to insure was incidental to the mortgage, the original subject of jurisdiction, and where moreover the breach of such covenant to insure was one of the grounds warranting the foreclosure, would seem clear. That the Court did not see fit in an interlocutory stage of the case to make such order, that in such preliminary stage it did not enter into an immediate, definite ascertainment of its right or duty to do so, cannot affect the relative right of the parties. Mere lapse of time will not prevent a Court of Equity from affording relief where there was a right to relief when the bill was filed. Wilkinson *vs.* Torkington, 2 Younge & Collyers Reports, 729.

"Pending the appointment of a Receiver, the purchasers agreed to and did place insurance, and the improved property has been wholly destroyed. If the insurance goes to the bondholders it represents an avoidance of loss for that which it held as security for money paid to the mortgagor. If the purchaser holds it, it speculatively gains by the destruction of that for which it had never paid, to wit: the $250,000, representing deferred purchase money.

"Now, on final hearing of this case, it being clear that the purchaser was liable at any time during its pendency to the entry of an order directing that insurance be entered for the benefit of the trustee, and the purchaser having in effect placed insurance subject to the determination of the Court as to its liability to do so, why should not the Court on final hearing enter the decree which it could have made in an earlier stage of the case? This insurance was placed by a party to this litigation under stress of an application for the appointment of a Receiver and a consequent exclusion from possession. It is now clear that such litigant should have placed the insurance for the benefit of the trustee and was bound to do so if thereto required by the Court. When now on final hearing the proceeds of that insurance is before the Court, when the position of the parties has not been changed, why should not this Court on final decree stamp with an equitable lien the proceeds of a fund which it might have created by an earlier order.

"The position of the parties has not changed. To say that the trustee had an insurable interest

and could itself have insured, does not affect the case. While it could do so, it could also require the mortgagor to perform this duty. The purchasers with full knowledge of that duty on the part of the mortgagee, took the property and undertook to indemnify the vendor against this covenant. This they have not done. They paid some $83,000 for the property. They insured it for more than three hundred thousand dollars and now on the destruction of the property, which was the substantial security for $250,000 owing the trustee, they seek to avoid payment of the $250,000 and to realize on the $83,000 paid by them the sum of upwards of $300,000 in insurance upon property for which they have never paid.

"The allowance of such a result under the facts and circumstances would be highly inequitable, for it is a principle of equity that in a contest between one who is seeking to make a gain and one who is struggling to avoid a loss, equity will lean toward him who has actually lost, rather than to him who merely seeks to gain. Miller *vs.* Aldrich, 31 Mich., 416."

V.

Interest was properly allowed on the coupons.

"That interest is recoverable upon coupons from the time they are in default is universally conceded. This interest is allowed by way of damages as a compensation for the delay of payment."

Short's Law on Railway Bonds and Mortgages, p. 104, and cases cited.

This is the uniform rule in the United States Courts and has been applied over and over again throughout the States by those Courts.

Gelpcke vs. *Dubuque*, 1 Wall., 206 (Pa.).

Aurora vs. *West*, 7 Wall., 105 (Ind.).

Clark vs. *Iowa City*, 20 Wall., 589 (Iowa).
Town of Genoa vs. *Woodruff*, 92 U. S., 503 (N. Y.).
Walnut vs. *Wade*, 103 U. S., 696 (Ill.).
Scotland County vs. *Hill*, 132 U. S., 117 (Mo.).
Commissioners vs. *Aspinwall*, 21 How., 159 (Ind.).
Koshkonong vs. *Burton*, 104 U. S., 676 (Wisc.).
Cromwell vs. *County of Sac*, 96 U. S., 62 (Iowa).
Hollingsworth vs. *Detroit*, 12 Fed. Cas., 352 (Mich.).
Pana vs. *Bowles*, 107 U. S., 529.

The rule of the New York Courts that coupons only bear interest after negotiation by the owner of the bonds and when in the hands of a different person from the owner of the bonds, does not obtain in the United States Courts.

Railway Co. vs. *Sprague*, 103 U. S., 761.

Nor in the Courts of Pennsylvania:

County of Beaver vs. *Armstrong*, 44 Pa., 63.
Railroad vs. *Fidelity I. T. & S. D. Co.*, 105 Pa., 216.
Railroad vs. *Smith*, 105 Pa., 195.

Counsel for the appellant are wrong in stating on page 104 of their brief that there is no provision in the bond for coupons. The form of bond *and coupon* is set forth in the mortgage (Rec. Vol. I, pp. 20–21) being introduced by a reference in the mortgage itself to the bonds and "coupons or interest warrants accompanying the same" (X. *Ib.*, p. 19).

There is nothing in the suggestion of counsel that the lien of the mortgage does not extend to

interest on coupons. As well say that the lien of the mortgage does not extend to interest on the bonds themselves after their maturity, when such interest is of course not represented by coupons, and yet must clearly be included in a foreclosure decree as part of the amount due. Both as to mature bonds and mature coupons, the interest is allowed by way of damages "as a compensation for the delay of payment" and is covered by the lien of the mortgage as an incident to the debts evidenced by the bonds and coupons.

The decree of the United States Circuit Court for the Western District of Pennsylvania should be affirmed with costs.

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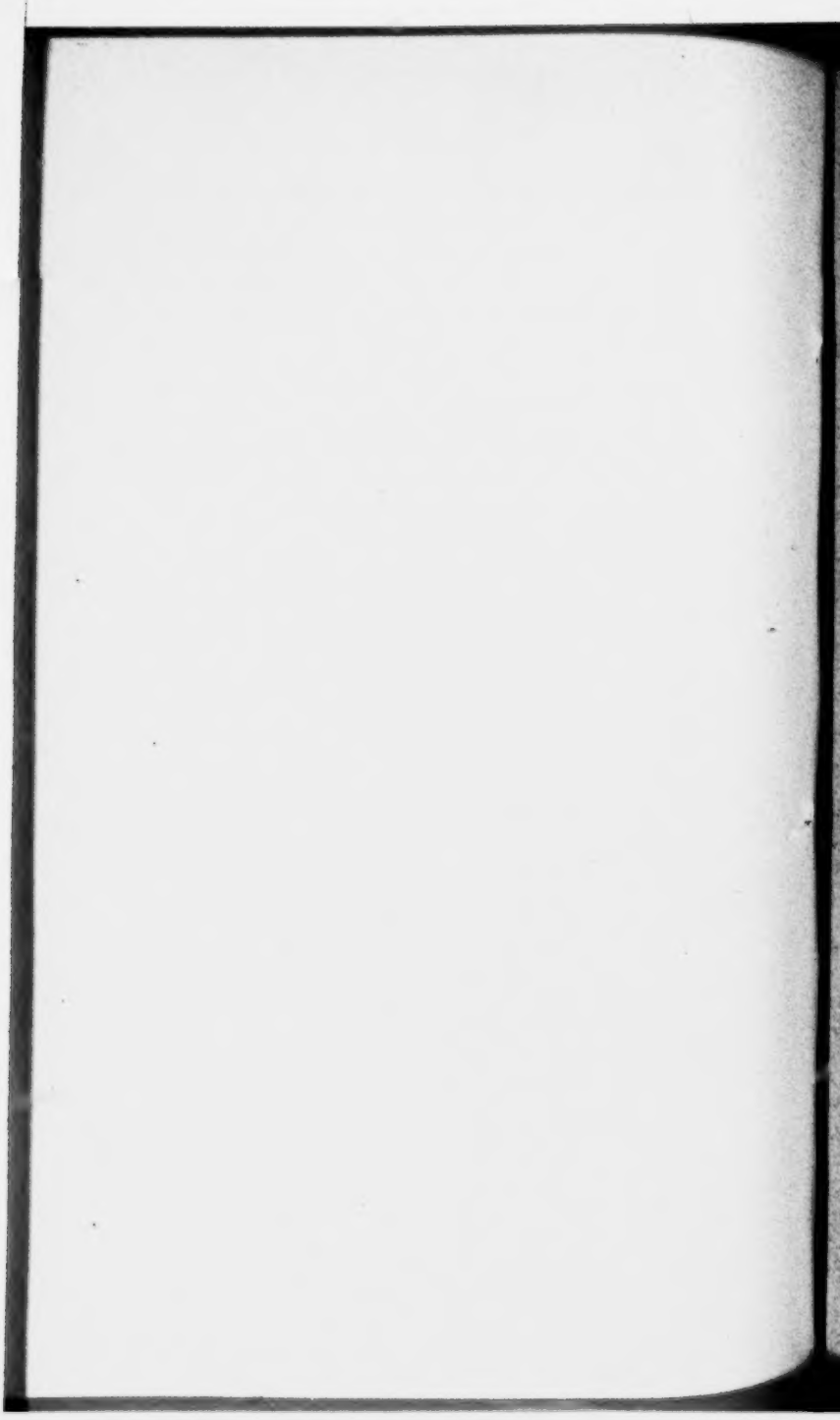

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for Petitioner

Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 180.

Filed April 10, 1902.

THE FARMERS' LOAN AND TRUST COMPANY,
TRUSTEE,
Petitioner,

vs.

THE PENN PLATE GLASS COMPANY AND WILLIAM L. KANN.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Brief for the Farmers' Loan and Trust Company, Petitioner.

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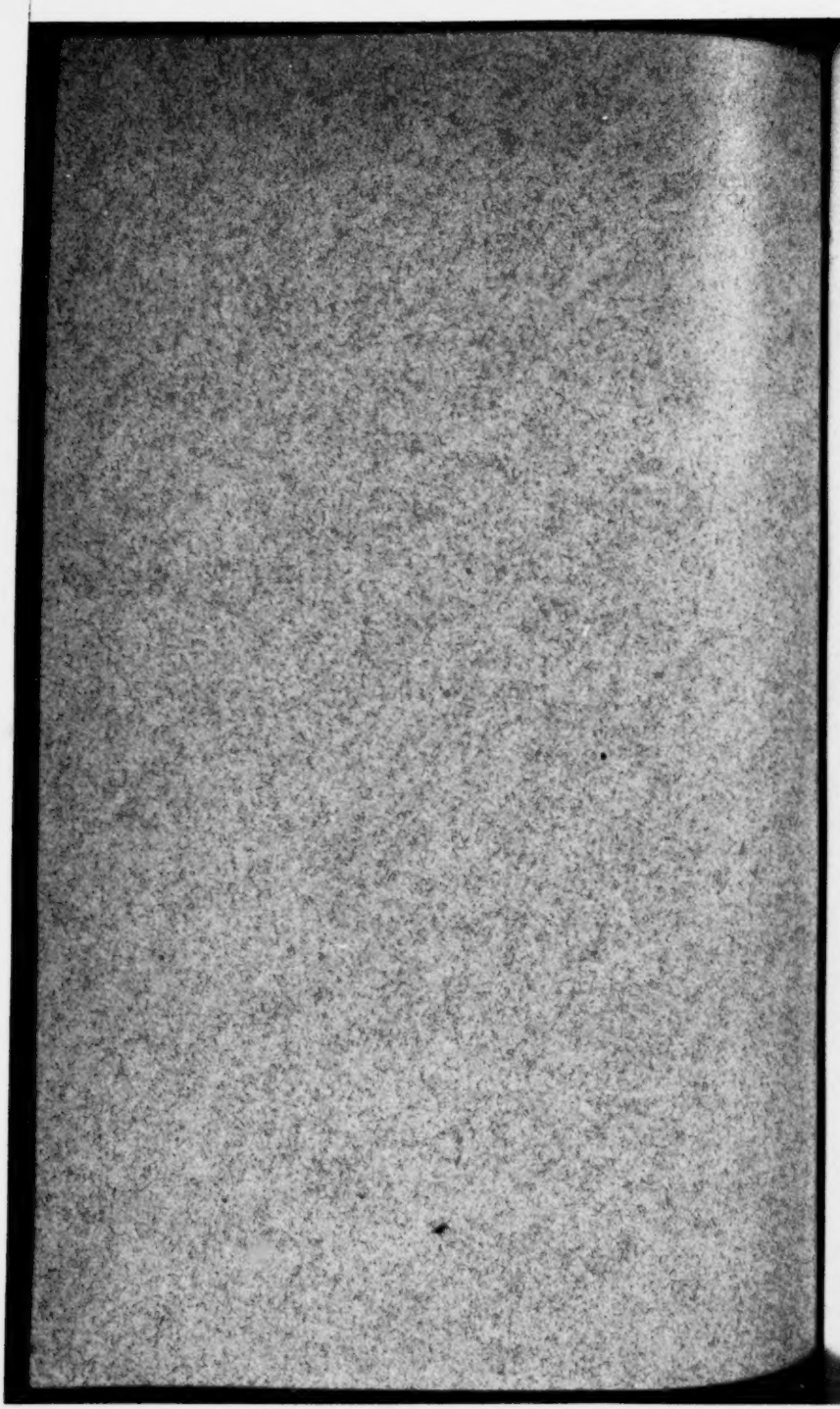

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE FARMERS' LOAN AND TRUST COMPANY, Trustee,
Petitioner,

vs.

THE PENN PLATE GLASS COMPANY and WILLIAM L. KANN.

No. 180.

This is a proceeding to review the action of the United States Circuit Court of Appeals for the Third Circuit in reversing a decree of the Circuit Court, in the above entitled cause.

Statement.

On January 1st, 1891, the *Pennsylvania* Plate Glass Company (a Pennsylvania corporation) made a mortgage to The Farmers' Loan and Trust Company, a New York corporation, to foreclose which mortgage the original bill in this cause was filed in the Circuit Court of the United States for the Western District of Pennsylvania. The mortgage covered the franchises, plant and buildings of the Mortgagor Company, including a specified tract of land in Irwin, Westmoreland County, Penn-

sylvania, with certain gas and water contracts, and all the other property, real or personal, then owned or thereafter to be acquired by the said Pennsylvania Plate Glass Company, including rents, issues and profits (Rec., p. 27).

This mortgage was made in trust to secure six per cent. bonds which were issued to the amount of $250,000 of principal. The Plate Glass Company began to do business and was reasonably successful, and the bonds were sold for money and passed into the hands of innocent holders.

Subsequently, the defendant, William L. Kann, had his attention called to the Plate Glass Company. Finding that it was likely to be affected by financial depression, he nevertheless deliberately loaned it money, entered the Board of Directors, and became Treasurer. It was not long before his proceedings as a creditor forced the directors to authorize a proceeding in the Court of Common Pleas of Westmoreland County, Pennsylvania, to procure the judicial dissolution of the Pennsylvania Plate Glass Company. In that suit, Joseph W. Stoner, one of the directors, was, on March 19th, 1894, appointed Receiver, and entered into possession accordingly (Rec., pp. 353-362; 411-416; 442-445; 450-457; 463; 474-478; 420-435).

The Trust Company was not a party to those proceedings and the result was an order of the Westmoreland Court for the sale of the property by the Receiver, *subject to the lien of the existing mortgage for $250,000*. Accordingly, on the 18th of June, 1894, the Receiver sold the property so subject to the mortgage at public auction. The property, it will be noted, was not sold subject to any possible claim that might be proved to exist, but subject to this particular mortgage for this *specified* amount of $250,000, fully described in the order of sale and in the terms of sale.

The defendant, W. L. Kann, officer and creditor of the company, who had precipitated the entire proceeding, became the purchaser, the price being $37,500. On July 2nd, 1894, a deed was, by order of the Westmoreland Court, given by the Receiver to Kann. It distinctly, and in accordance with the express terms of the order, recited that the conveyance was made "*subjected to a mortgage made by the said Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of the City of New York for two hundred and fifty thousand dollars ($250,000), dated Jan. 1, 1891, recorded in Westmoreland County in Mortgage Book 43, page 1*" (Rec., pp. 469-470). This was the mortgage now in process of foreclosure.

Kann retained the title for one year, during which he paid the interest on all the bonds represented by the coupons which fell due July 1st, 1894, and January 1st, 1895, respectively (Rec., pp. 60, 61). These, however, were the last coupons paid, for, on the 1st day of July, 1895, the very day upon which another instalment of coupon interest fell due, *a new company just organized by Kann* under the name of the PENN PLATE GLASS COMPANY, of which he was president, and which is the contesting defendant in this case received a deed of the property from Kann; and it deliberately permitted the coupons falling due on the same day to be defaulted.

The old Company had thus fallen into the power of Kann; the purchaser at the forced sale of its property was Kann; and the new Company was Kann.

The deed given to the new company by Kann on the first of July, 1895, the day of the first default, expressly recited, as did the original deed by the Receiver to Kann himself, that the conveyance was made "*subject to a mortgage made by the Pennsylvania Plate Glass Company to the*

Farmer's Trust and Loan Company, of the City of New York, for two hundred and fifty thousand dollars ($250,000), dated January 1, 1891. recorden in Westmoreland County, in Mortgage Book 43, page 1." The consideration set forth in the deed from Kann to the Penn Company was $83,500.

Upon the default in the payment of coupons, the Trust Company served written demands for their payment upon the defendants, the Pennsylvania Plate Glass Company, W. L. Kann, the Penn Plate Glass Company and Joseph W. Stoner, Receiver (Rec., pp. 100-101). Six months having elapsed, and these defaults still continuing, the Trust Company, following the terms of the mortgage, by written instrument declared the principal of the bonds to be due and payable (Complainant's Ex. 3, Rec., p, 62), and two days later, on the 8th day of July, 1896, it filed its Original Bill for the foreclosure of the mortgage.

The original company that made the mortgage, the Pennsylvania Plate Glass Company, the grantee William L. Kann, and the subsequent grantee, the Penn Plate Glass Company, were made parties defendant to the foreclosure suit. No defense was made by the Pennsylvania Plate Glass Company, but the defendant Kann, acting in his own name and the name of the Penn Plate Glass Company, saw fit to demur to the suit, and, later on, to file a joint and several answer. (Rec., pp. 41-52).

The demurrers were overruled, the answer and the replication were filed and the taking of testimony was begun on April 12th, 1897. (Rec., pp. 56-57).

In July, 1896, at the beginning of the foreclosure suit, the complainant *being a trustee without funds* and the bondholders being scattered, the complainant made a motion for a receiver, which the court denied. (Rec., pp. 43-44).

We submit, and press the point, that the complainant was unquestionably entitled to a receiver at that time. There were three instalments of coupon interest overdue and unpaid and the principal had, by the express terms of the mortgage, matured. *The receivership was, moreover, essential for the purpose of protecting the interests of the trustee and bondholders from possible loss by fire.* This was expressly urged as one of the most important grounds for the Court's taking possession of the property on behalf of the trustees, and it resulted in the giving by the defendants of the undertaking relative to insurance hereafter more fully referred to. (Rec., pp. 437-439). The Pennsylvania Plate Glass Company, and its receiver, Stoner, recognizing the obligation imposed on them by the mortgage, had kept the property insured for the benefit of the mortgagee. But Kann and the Penn Plate Glass Company, in spite of the protests of the mortgagee, had allowed all this insurance to lapse, had failed to insure for the benefit of the mortgagee and were neglecting and refusing so to do. The desired relief having been refused, the property remained in the possession of the Penn Plate Glass Company, insured by it, to be sure, but not in terms for the benefit of the mortgagee or the bondholders. Indeed, the interests represented by Kann, although taking out policies to the amount of over $400,000, took pains to insert the following clause in their policies:

"This property is subject to a bonded indebtness of $250,000, but it is distinctly understood and agreed that this insurance does not cover the interest of the bondholders."

When it is remembered that the company which took out these policies defaulted on the coupons from its very organization, it becomes clear that the

intention was to try and defeat the mortgage by the defenses which have failed in this case, and thus be enabled to collect the entire value of the plant as if no mortgage existed.

By the refusal of the Circuit Court to grant a receiver who might at once insure the property FOR THE BENEFIT OF WHOM IT MIGHT CONCERN, a great and overwhelming injury was done to the bondholders, for on April 12, 1898, a very great portion of the property was destroyed by fire. (Rec., p. 387). The ruins afterwards sold for scarcely enough to pay costs.

The defendants had just closed their testimony under the original bill, so that at the time of the fire the complainant was still being prevented by the defendants from obtaining a decree of foreclosure and sale, under defenses which were overruled in the decree on the strong ground that they did not in law constitute defenses to a foreclosure suit, and which the defendants themselves *abandoned* on their appeal to the Circuit Court of Appeals.

The complainant hastened to file its supplemental bill, the object of which was to impress the lien of the mortgage upon the insurance effected by the defendant Kann, in the name of the Penn Plate Glass Company (Rec. pp. 377-390). Under this bill the Insurance Companies were made parties defendant. The defendants Kann and his Company demurred to the supplemental bill as they did to the original bill. These demurrers were also overruled by the Circuit Court (Rec., p. 397). Thereupon the defendants filed a joint and several answer to the supplemental bill (Rec., pp. 398-404). Replication was filed (Rec., p. 404), and testimony taken by both sides. A receiver of the insurance moneys was appointed by the Court, who was directed to collect and hold subject to the final

order of the court $125,000 of the insurance moneys, which he has accordingly done.

Mr. Wertheimer, the owner of 160 bonds, being a relative of the defendant Kann, and one of the incorporators of and parties interested in the new Company (Rec., p. 426), threw in his weight with the defendants and stipulated that he would make no claim to anything received from the insurance moneys, and hence the payment of $125,000 was fixed upon as being sufficient to cover the 90 other bonds with costs and charges.

The final decree was rendered July 25, 1899, in the United States Circuit Court by the Hon. Joseph Buffington, District Judge (Rec., pp. 503–512). This decree ordered the foreclosure of the mortgage and a sale of the property, unless the bonded indebtedness should be paid within a short day, and made reference to a Special Master to ascertain and report which of the bonds were entitled to the security of the mortgage, etc., and ordered the sale of the property as an entirety, etc. THE DECREE FURTHER HELD THAT THE TRUSTEE WAS ENTITLED TO AN EQUITABLE FIRST LIEN UPON THE INSURANCE AND INSURANCE MONEYS TO THE EXTENT OF ALL THE VALID OUTSTANDING BONDS SECURED BY THE MORTGAGE; and inasmuch as a receiver of the insurance moneys had been appointed under the supplemental bill, and a very large part had been collected by him, the Court proceeded to order the application of such moneys to the payment of the bonded debt, etc.

Bonds were outstanding to the amount of $250,000, and the testimony shows that Kann did not pretend to have paid more than $37,500 for the property or to have expended upon it prior to turning it over to the new Company one year later more than enough to bring the whole price with interest up to $83,500, the amount

of the consideration named in the deed which he made to the Penn Plate Glass Company. Even adding the full amount of the improvements carried out by the Penn Company under Kann's contracts, the cost of this equity in the property to the Penn Company was only $118,000 (Rec., pp. 361-362). Defendant's counsel, seeking to show that the value of the equity covered by the policies was much greater, quoted below some testimony of Kann's which shows that up to the date of his testifying (which was in 1898) the defendants had spent about $200,000 in improvements. But we are considering the value of the equity as stated in the policies which were all taken out by Kann and the Penn Company "at the time of their respective purchases of the property" as counsel for the defendants insisted. At that time the property, including the price paid at the receiver's sale, had cost the defendants only $118,000. These figures are eloquent and speak for themselves when compared with $450,000, the insurance claimed to have been placed at that time upon the equity alone. But even if we take the figure given by Kann as the full cost of the improvements, namely, $200,000, and add $37,500 paid for the property at the sale, there is still a long way to $450,000. And yet the property subject to the mortgage is the property covered by the policies, which policies expressly declare it to be covered by a mortgage of $250,000. The fact, then, that some $400,000 of insurance have been actually collected is one of great significance. The Insurance Companies have paid in this fund, in this cause and under order of the Court, a portion of it is retained by the Receiver to be paid to the party whom the Court decides to be entitled to it. Is this party the defendants, who, in the policies themselves, admit the existence of a mortgage lien of $250,000, and yet seek to collect the

full value of the destroyed property? Or is it the holders of the bonds whose mortgage covered the plant ruined under the circumstances above outlined?

The case comes before this Court on a writ of certiorari issued upon the application of the Complainant. In the lower Courts Judges Acheson and Buffington had decided in favor of the Complainant, while Judges Gray and Dallas had taken a contrary view. The matters involved are of great gravity and include the decision of very weighty points of law.

Specification of the Errors Relied on.

1. The learned Circuit Court of Appeals erred in reversing the decree entered by the Circuit Court for the Western District of Pennsylvania.

2. The learned Circuit Court of Appeals erred in not affirming the decree entered by the Circuit Court for the Western District of Pennsylvania.

3. The learned Circuit Court of Appeals erred in holding that the Trustee of a mortgage to it executed by the Pennsylvania Plate Glass Company, to secure certain bonds issued by said Glass Company, was not entitled to the benefit of moneys realized under policies of insurance of the mortgaged premises paid, after a fire had occurred, to the successor in title of said Pennsylvania Plate Glass Company which had taken a conveyance of said mortgaged premises subject to the mortgage.

4. The learned Circuit Court of Appeals erred in holding that under said mortgage, the mortgagor was not obliged to effect insurance for the benefit of the trustee of the mortgage.

5. The learned Circuit Court of Appeals erred in holding that the conveyance to the ultimate grantee of the mortgaged premises, subject to the mortgage, imposed no duty upon such grantee, either in favor of the original mortgagor, or by subrogation to the rights of such mortgagor, in favor of the mortgagee, to insure the mortgaged premises.

6. The learned Circuit Court of Appeals erred in holding that the fund raised by insurance of the mortgaged premises, effected by the ultimate grantee, which had taken under and subject to the mortgage, was not impressed, under all the circum-

stances of the case, with an equitable lien, in favor of the trustee of the mortgage.

7. The learned Circuit Court of Appeals erred in holding that by virtue of an obligation entered into at the time of the refusal of a motion for a Receiver of the mortgaged premises, made after default by the trustee of the mortgage, there was no right on the part of the trustee to claim the benefit of moneys paid upon policies of insurance of the mortgaged premises to the grantee of the mortgagor.

FIRST.

Without regard to any provision in the mortgage, the Complainant has an equitable lien on the Penn Company's insurance, and, under the circumstances, that company must be treated as in the position of a Receiver.

When the complainant filed its original bill and applied to the Circuit Court for a Receiver, $250,000 of principal and a large amount of interest was overdue and unpaid. The defendants had also broken other covenants of the mortgage. By the express terms of the mortgage and by the ordinary rules of equity the complainant was entitled to the immediate appointment of a Receiver. The action of the Circuit Court in denying the motion was error, but inasmuch as the property has remained in the hands of the defendants, who have collected its income, the error can be rectified.

It would have been the first duty of a Receiver to insure, using for that purpose the income which the defendants have thus collected. That duty has been performed by the defendants, in person, and the insurance money must be applied to the benefit of the mortgage trustee.

In order that there may be no possible mistake let us examine carefully certain provisions of the mortgage itself, which will be found on page 31 of the record:

"Article Second: In case default shall be made in the payment of any instalment of interest on any of the aforesaid bonds, according to the tenor of the said bonds, and of any of the coupons accompanying the same, or in the performance of any covenant, agreement or stipulation herein contained and hereby required to be kept and performed by the said party of the first part, and if such default should continue for a period of six months, after demand made in writing by said trustee upon the said party of the first part for the payment of the said moneys, or the performance cessor said covenants, it shall be lawful for the said of thee, the party of the second part, or its suctruste or successors, personally or by its attorneys or agents, to enter into or upon all and singular the premises hereby conveyed, or intended so to be and each and every part thereof, and wholly to evict the said party of the first part, its agents and servants therefrom, and to have, hold and use the same, operating by its managers, superintendents, receivers, servants or other attorneys or agents, the said Plate Glass Company and appurtenances, conducting the business thereof, and enjoying the franchises pertaining thereto, etc."

It is also provided as follows:

"Article Fifth. In case default shall be made in the payment of the semi-annual instalments of interest of any of the said bonds according to the tenor of the said bonds, and the coupons accom-

panying the same, and in case any such default shall continue for a period of six months after demand by said trustee, in writing, for the payment of the said moneys, the principal of the bonds secured hereby, and the said accrued interest shall, at the election of the said trustee, become immediately collectable, from and out of the said mortgaged premises, anything in the said bonds, or herein contained, to the contrary notwithstanding, and the said trustee may thereupon immediately proceed to cause the said premises to be subjected to the payment of the said debt in like manner as hereinbefore provided."

Default as we have seen took place on the first day of July, 1895, and again on the first day of January, 1896, and the Trustee made demand in writing, for the payment of the money.

There was thus a failure on the part of the mortgagor company and of those taking under it to carry out the covenants and stipulations in the mortgage including the covenant or stipulation for the payment of interest; and on a continuance of such failure for six months after demand in writing by the Trustee for the performance of such covenants or stipulations the principal of all the bonds matured and the Trustee had a right to take possession of the property. Such right having matured the Trustee made its motion for a Receiver, but that motion was denied in consequence of the active opposition of the Penn Company and of its owner, this same man Kann, who was in possession of the mortgaged property as President and active executive officer of the Penn Company.

The duty of a Court to protect the subject-matter of a mortgage by insurance is too plain for argument, and protection of the property is the primary object of an equity Receivership.

In *Wallace* vs. *Loomis* (97 U S., 146), it was said that the power of a Court of equity to appoint

managing Receivers of corporate property is "a part of that jurisdiction, always exercised by the Court, *by which it is its duty* to protect and preserve the trust funds in its hands." And this language was repeated in *Quincy, etc., R. R. Co.* vs. *Humphreys*, 145 U. S., at p. 104.

THE TRUSTEE'S MOTION FOR A RECEIVER WAS EQUIVALENT TO AN ATTEMPT TO TAKE POSSESSION.

In *American Bridge Co.*, vs. *Heidelbach* (94 U. S., 798) the Court said:

"The mortgagees had the option to take personal possession of the mortgaged premises, or to file a bill, have a Receiver appointed, and possession delivered to him."

In *Allen et al.* vs. *Dallas & Wichita R. R. Co.* (3 Woods, 316), a railroad mortgage gave the Trustees the right to enter upon and take possession of the railroad company's property and operate it in default of the payment of interest. A default having been made, the Trustees filed their bill for foreclosure, instead of entering upon the property, and asked for the appointment of a Receiver. It was held that such default was a sufficient ground for the appointment of a Receiver upon the application of the Trustees, and that the Trustees were entitled to a receivership. The Court expressed the reasons for its decision most forcibly, and we accordingly quote the opinion at length:

"It remains to consider whether there was any necessity for the appointment of a Receiver, and whether, under all the circumstances as they now appear, a Receiver should have been appointed.

"In my judgment, independent of any necessity for the appointment of a Receiver to protect and preserve the trust property, it was the right of the bondholders, under the terms of the trust deed, to

have a Receiver appointed to take possession of the trust property.

"The rights of holders of negotiable bonds issued by a railroad company and secured by a mortgage upon its property, are not be measured by the same rules as are applied to an ordinary mortgage of a farm or house and lot, to secure one or two notes held by one mortgagee.

"In this case the trust deed pledged the receipts and income of the railroad property for the payment of the principal and interest of the bonds. It declared that after three months' default in the payment of the principal and interests of the bonds, or any part of either, upon the written request of one-tenth of the holders of the bonds, it should be competent and lawful for the Trustees to enter upon and take possession of the trust property, and to use and employ the said railroad and the property and appurtenances proper for its use, to make all necessary repairs, pay all proper expenses of the management thereof, including taxes, and to apply the proceeds to the payment, *pro rata*, of the principal and interest due on the bonds. In short, it was made the duty of the trustees in the contingency named, to exercise the rights and perform the duties of Receivers appointed by the Court.

"These provisions were inserted in the deed of trust to give credit to the bonds, to enhance their value and induce capitalists to purchase them. *They constituted a part of the consideration which the railroad company offered to purchasers of its bonds.*

State of Maryland vs. *The Northern Central R. W. Co.*, 18 Md , 183.
Dunville vs. *Ashbrook*, 3 Russ., 99 (3 Eng. Chy. Note C).

"A mere default in the payment of the debt is no ground for the appointment of a Receiver, but this is not true where there is a stipulation in the mortgage that the mortgagee shall have the rents.

Whitehead vs. *Wooten*, 43 Miss., 523.
Morrison vs. *Buckner*, Hempst., 442.

"Are all these provisions of the deed of trust to

be disregarded? If not, are the rights of the bond holders impaired by the fact that the trustees, instead of taking possession of the trust property, as they had a right and it was their duty to do, have applied to this Court to assist them in the execution of the trust whose duties they have assumed?

"These trustees might, as is sometimes done, have first taken possession of the trust property under the authority of the trust deed, and upon written demand of one-tenth of the bondholders, and afterwards filed their bill asking the Court to protect their possession and aid and instruct them in the discharge of their trust. Such a course would have been perfectly proper and competent. But having chosen to file their bill in the first instance, neither they nor any bondholder has lost any right, *and it is the clear duty of the Court to give them all the rights conferred by the deed of trust.*

"By the terms of this trust deed the bondholders, upon default in the payment of interest, are entitled to have the income and profits of the trust property applied to the payment of their debt. This can be done only by possession taken of the trust property, either by the trustees or a receiver. By a failure to take possession, the bondholders are in danger of losing their right to the income and profits

American Bridge Co. vs. *Heidelbach*, 94 U. S., 798.

"It is evident that the rules applicable to the appointment of a receiver upon an ordinary mortgage do not apply here. The bondholders are not precluded from the appointment of a receiver because it is not shown that the property is insufficient to pay the mortgage debt, that the mortgagor is insolvent, or that the trust property is in jeopardy, or because the amount due is in dispute.

* * *

"Regarding, therefore, only the terms of the trust deed, upon proof of a three months' default in the payment of the interest and upon a written request made by one-tenth of the holders of the bonds upon the trustees, that they exert the powers conferred upon them by the trust deed, it

would be the duty of the Court without further showing, to appoint a receiver, so that the value of the bonds, as commercial paper, might be preserved, and all the rights of the bondholders secured."

In the case at bar the mortgage covered the rents, issues and profits. Had the Court appointed a Receiver, as prayed by the Trustee, those rents, issues and profits would have been collected by him and applied in part to the payment of insurance premiums. As it is, by the failure to appoint a Receiver, all the dangers alluded to in the above opinion have befallen the unfortunate bondholders, and the failure of the Court to appoint the Receiver *was due entirely to the action of the Penn Plate Glass Company and its organizer, Kann.*

Mr. Ferguson, put on the stand after Mr. Schoyer had been called on the complainant's behalf and had refused to testify (Rec., p. 439), described the events as follows:

"According to my recollection I received notice from Judge Buffington that he had concluded to deny the appointment of a receiver. According to my recollection it was the following day. I went into Court. *Mr. Schoyer* was there and *Mr. Kann* was there, and I said to the Court that in considering the motion for a Receiver it occurred to me that the Court had not considered the fact that this property was without insurance; that there was danger of fire; that my client was a trustee without funds, and that that was a matter that ought to be considered, and that we were entitled to insurance. The other side denied that they were bound to insure under the terms of the mortgage. I insisted we should have insurance, they denying that we were entitled to insurance under the mortgage, and under the circumstances Judge Buffington said: 'I can't decide that question,' and intimated to them that if they were bound to insure they ought to protect us, and they denied they

were bound to insure, and the paper signed by Mr. Kann and Mr. Wertheimier was given to us in pursuance of my demand for insurance, and filed in Court, and is on file to day".

Of course, if the Court had appointed a receiver and taken possession at that time, its first duty would have been to see that the property was properly protected by insurance FOR THE BENEFIT OF WHOM IT MIGHT CONCERN. Whether the original mortgagor company, or the present owner, or Kann himself in his individual capacity, were personally bound to insure, were questions which were not at all pertinent in the proper consideration of the matters then before the Court. The Court had charge of a large and valuable piece of property. Its primary duty was to see that this property was preserved in the ordinary business way, that is to say, by proper insurance. It had before it as complainant and mortgagee, a Trustee *without funds* with which to buy insurance, but having a clear right to the application of the property's income in part to the purchase of such insurance. Who might own the proceeds of the sale of the property, or who would own the insurance moneys, which would stand in its place, in case it should burn while in the Court's custody, would be questions properly determinable later on in the case. But the *first* thing to do was to take possession of the property and protect it. For it must not be forgotten that at that very time the entire debt of the Mortgagor Company to the complainant as trustee had become due, being $250,000 of principal and several instalments of interest. The rights of the trustee were so vast and overwhelming that alongside of them no one else should have been considered for a moment.

When we look back upon it and consider the results that have followed this fundamental error, it seems difficult to understand how such

a mistake could have been made, still less that now, when all the parties are before the Court, the error can not be rectified. But here appears Kann again—the same malignant influence contesting vigorously the motion for a receiver. He, as has been shown, was the creditor who had originally, by his threats, compelled the old company to seek a receivership, and who, having purchased the property at a forced sale, was now president of the new company and as such in charge. He owned the company, but repudiated all obligation to pay anything,—interest, taxes or insurance. What he insisted upon was the right to continue in possession with all the beneficial results arising from possession, and with none of the corresponding burdens. Of course, it did not make a particle of difference whether the original mortgagor company or Mr. Kann or the new company were any or either of them under any personal obligation to insure. We shall show, we think, later on, that they were so bound by the express wording of the mortgage. But whether they were so bound or not, one thing was *certain*:—the complainant was entitled to have the property taken charge of by the Court and duly protected in order that its large matured debt should be paid.

Now, when the property remained in the hands of Kann through the inequitable denial of our receivership, what was the situation? He individually or as president of his new company was in possession. He had full knowledge of the complainant's claims. He knew all the facts—no one better. He ought to have been displaced by a receiver. He would have been displaced by a receiver if it had not been for his own conduct in opposition. The motion was denied because of his opposition. Still he was in possession and the property was insured. He himself had insured it for a very large amount for his own benefit. We care nothing

what name he used, whether he or his company was the nominal party insured, it is immaterial which. As the property stood in the name of the company this $450,000 of insurance stood in the company's name also. Kann and his company must be treated in fact *as receivers*, and just as a receiver's insurance would have inured to the benefit of whom it might concern, so must his insurance be held by a court of equity to have been taken for the benefit of the creditor trustee and the bondholders who furnished the plant which in fact made him and his company.

It must not be forgotten that this property and all these parties have been under the jurisdiction and protection of a Court of Equity ever since the original bill was filed in July, 1896. The denial of the motion for a receiver, the insurance effected by Kann, and the fire, have all occurred since that time. Kann had bought the property, subject to the mortgage of $250,000, for $37,500. When he organized the Penn Company and conveyed the property to such new organization, he named $83,500 as the value. Now he proposes to collect, as the result of this fire—this most fortunate accident—over $400,000. All the bondholders' insurance moneys will go to him. Judge Acheson, in his dissenting opinion (Rec., page 546), says that the highest figure for all the expenditures, given by Kann himself, is "about $185,000 to $200,000." and continues: "Now, if the larger of these "amounts is correct, the reversing decree here will "result in a *great money speculation* for the ap- "pellant company (the Penn Plate Glass) at the "expense of the innocent holders. But, in fact, "Kann's testimony, when scrutinized, discloses "that the bulk of the alleged expenditures was in "the purchase of additional ground (outside "the mortgaged premises) and in the erection "thereon of a water plant and a gas plant." (Rec., page 546).

Before we leave this branch of the case permit a hasty summary.

For an expenditure of less than $100,000 parties become the owners of a large piece of property, subject to a mortgage of $250,000 and interest. They absorb all the income and neglect all obligations under the mortgage. As a necessary result the entire principal and interest become due, and as a further necessary result, by the express terms of the mortgage, the trustee is entitled to take possession of the mortgage security personally or by a receiver. The trustee, having filed its bill for foreclosure, appeals to the court in the ordinary way for the enforcement of its rights and for the appointment of a receiver. This is opposed by the parties in opposition and the strange mistake is made by the court of permitting the defendants to remain in possession. They insure the property for some $450,000, a large overvaluation of the entire property, which scarcely can be considered worth $200,000 beyond the amount of the mortgage.

Then comes the fire, causing a total destruction of the property and leaving as security for the bondholders a small piece of land scarcely worth more than enough to pay costs and expenses. The Insurance Companies compromise the claims against them, being allowed a small reduction, and pay in some $400,000, which represents the entire loss. No reduction is made for the mortgage. *They pay the entire value of the destroyed property.*

But are the defendants entitled to collect this entire amount? There was a mortgage of over $250,000 on the property when it was destroyed. The bondholders had this interest in the property before the fire, a first lien; the defendants had simply an equity worth possibly $100,000 or a little more. The insurance covered the entire value. Did the fire in fact transfer this $250,000 of value

from the creditors to the debtors? Practically this is what the Appellate Court affirms.

No one will deny that the action of the Circuit Judge in refusing a receiver was error. But inasmuch as insurance was effected, and inasmuch as the insurance moneys have been paid, the Court is in a position to rectify the error without injury to anyone. The bondholders should not lose the amount of the mortgage debt. They simply will collect it out of the new form the property has taken. Is there not a remedy for such mistaken action as that of the Court below in refusing a receiver?

Is this fire in fact a huge profit on the part of these defendants—a most exceptionally fortunate burning—or will equity come in and say that some things must not be, that its protecting arms have been around this property, and the rights of these people have been subject to its sway ever since the commencement of the suit, ever since the trustee appealed to a court of equity for the enforcement of its rights, and that such being the case, the property being here, the parties being here, the proceeds of the insurance being here, equity will see to it that justice is done? Some inequities cannot be permitted to exist.

We will now pass to another view of the case. We now propose to show to the Court that in point of fact *the provisions of the mortgage* made it obligatory on the original mortgagor to keep the property insured for the benefit of the trustee (as, indeed, the original mortgagor admitted by so insuring) and that as these parties defendant now in possession really and actually stand in the shoes of those who made the original mortgage, the obligation to insure rests upon the defendants, and that the Circuit Court of Appeals erred in not

sustaining the action of the Circuit Court inrecognizing and enforciug such rights.

SECOND

The mortgage made it obligatory on the mortgagor company to insure for the benefit of the trustee, and by reason of its default, coupled with the trustees demand for possession, and the Penn Company's retention of possession, the trustee became entitled to an equitable lien on the Penn Company's insurance.

The tenth article of the mortgage contains the following provision relating to insurance: (Rec. p. 38).

"It shall be no part of the duty of the party of the second part (the trustee) to file or record this indenture as a mortgage or conveyance of real estate, or as a chattel mortgage, or to renew such mortgage, or to procure any further, other or additional instrument of further assurance, or to do any other act which may be suitable and proper to be done for the continuance of the lien hereof, or for giving notice of the existence of such lien, or for extending or supplementing the same; nor shall it be any part of its duty *to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance* or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made; but the trustee may, in its discretion, do any or all of the matters and things in this paragraph set forth, or *require the same to be done.*"

Plainly it is a recognition of an *obligation* on the part of the mortgagor, the other party to the agreement, to do certain things for the benefit of the bondholders, things which every bondholder would naturally insist must be done for his security. Somebody must record the mortgage and keep the property insured. The trustee has no money belonging to the trust and it cannot, therefore, be properly called upon to do these things which involve the expenditure of money. The bondholders cannot be expected to get together and furnish money for these expenditures. They are making an investment and are entitled to have the owner of the property on which the mortgage rests pay all the legitimate expenses. Moreover, practically considered, the holders of corporate bonds are generally too numerous and too scattered to be expected to act in concert or to attend to the protection of the property, the title to which is not in them. The owner of the property has all the trust funds and all the income arising therefrom, and very properly by entering into this agreement he contracts to do these things. By such contract the mortgagor company very materially increases the ease of negotiating its bonds, since it thus agrees to give the purchasers a protection to which they are entitled and which they will always be inclined to demand. It agrees that if by any oversight it fails in its duty in this behalf, the Trustee may require it to act.

It must not be forgotten that this agreement is accompanied by a number of other agreements everyone of which imposes upon the mortgagor an obligation which could not possibly be the obligation of any other person. How in the face of this fact can it be argued that the power given to the Trust Company to require insurance means anything but a promise on the mortgagor's part to

effect and preserve such insurance? Counsel may say that this provision does not arrive at the dignity of a "covenant". We are not concerned with the mere technical meaning of that word. Call this provision what you will,—covenant, agreement, stipulation,—it is none the less a contract which binds the mortgagor and imposes upon it an obligation from which it cannot escape.

The language of the District Judge on this subject is very clear and forcible (Rec. p. 496):

"There were two parties to this mortgage, the executing mortgagor and the accepting trustee. Now the liabilities or obligations created by a contract can rest originally only on a party to it. If they do not rest on some party to the contract, no obligation whatever exists. When, therefore, the Pennsylvania Plate Glass Company, in its mortgage, enumerated certain acts which the Trustee might, in its discretion, require to be done, it is clear that unless it imposed the fulfilliug of such requisition upon itself it imposed it upon no one. Indeed, the nature of the acts which the trustee was empowered in its discretion to require, shows that they were such as the mortgagor would naturally perform.

"Thus the trustee could require further instruments of conveyance or assurance. These would be executed by the mortgagor, the owner of the fee. It might require the payment of taxes. These the mortgagor, against whom they were assessed and who was legally bound for them, would naturally be the one to pay. So with the insurance. The owner of the property, the holder of the legal title, the person who had the insurable interest, would be the one to insure. Vesting in another a right to make a requisition implies an obligation to honor such requisition when made. We are, therefore, of opinion that by the terms of the mortgage the mortgagor company covenanted to insure on request of the trustee. The acts of the parties were in accord with such construction. Prior to the receivership the mortgagor company kept the property insured for the benefit of the bondholders, and its obligation so to do was recognized and enforced

by the State Court during the receivership by its issue of Receiver's certificates for the purpose. These policies were in force when Kann purchased. The proofs show they were turned over to him and he was informed by the Receiver they were outstanding. The covenant of the mortgagor to insure on request being shown, demand being made upon it for such insurance, and its failure to comply continued for six months vesting a right of entry and possession in the Trustee, we next inquire what was the relation to this duty of a successor in the possession and title of the mortgagor to whom such possession was delivered and the equity of redemption conveyed by an order of Court and deed based thereon, in the terms set forth in the foregoing opinion on the original bill?"

The following is taken from the opinion of the dissenting Judge in the Court of Appeals (Rec. p. 540):

"It is very clear to me that by this clause a right was conferred upon the trustee in the interest and for the protection of the bondholders to require insurance against fire to be placed by the mortgagor upon the mortgaged property. The parties to this indenture were the mortgagor as party of the first part and the trustee as party of the second part. Now a contractual right in one of two parties to an instrument to require a thing to be done implies a contractual obligation upon the other party to do the required thing. Here the right given to the trustee to require insurance involved a correlative duty on the part of the mortgagor to effect such insurance."

The mortgage was originally made, as we have already stated, by the Pennsylvania Plate Glass Company. That corporation never questioned its obligation under the mortgage to keep the mortgaged premises insured for the benefit of the complainant and of the bondholders. Indeed from the very beginning of the trust it placed and kept alive insurance for their benefit. Even when it was

placed in the hands of a Receiver by the State Court of Westmoreland County, Pennsylvania, the same obligation was recognized and the same course pursued by the State Court's Receiver, Stoner, whom Kann's course as a creditor, forced the directors to have appointed March 19, 1904.

Stoner had been stockholder, director, secretary and treasurer of the Company since 1893, and was acting in these several capacities, with the exception only of treasurer, in December, 1893, and in the early part of 1894, when Kann became treasurer and the receivership commenced. As an officer of the Company Stoner was familiar with its business and knew the condition of the insurance which he had obtained on its plant. He also knew all about the mortgage. He knew that the Company had procured insurance for the benefit of the Trustee of the mortgage, and that when he became Receiver in March, 1894, there was about $200,000 of such insurance outstanding (Rec., pp. 418-419, 422). This insurance had three ~~years~~ and nine months to run, some even a little longer. Moreover after he became Receiver he himself as such took out insurance for the benefit of the mortgagee under order of the Court, Receiver's certificates amounting to four or five thousand dollars, being issued for the purpose of paying the premiums, so anxious was the Court to preserve the insurance which the mortgage required (Rec., pp. 418, 422). The insurance so taken out by Stoner ran for six months, more or less. In all these policies, both those taken out before and those taken out after the Receiver's appointment, the loss was made payable to the mortgage trustee for the benefit of the bondholders (Rec., p. 423). Kann—the creditor who had forced the company into the receivership—made no opposition to any of this. He had not then become the owner of the property in person, and it

was then to his interest to have the *status quo* preserved. These policies were outstanding at the date of the Receiver's sale, in June, 1894, when the property was sold to Kann, subject to the mortgage, the latter taking a deed July 2d, 1894 (Rec. p. 422). Later on they were allowed to expire (Rec. pp. 422-424). The fact is undisputed that Kann knew of them and deliberately allowed them to lapse.

The above being the attitude taken towards the insurance by the mortgagor company and its receiver and by the Westmoreland County Court, the records of that Court show that upwards of $330,000 of insurance procured through agents was allowed to lapse (Rec., p. 464). But Stoner, officer and receiver of the mortgagor company, and Kann knew both before and after the receivership, and long before any default in the payment of coupons, that the Trust Company was standing on the covenant in the mortgage, and was insisting on the keeping up of the insurance for the benefit of the mortgage (Rec., p. 426). And Stoner further says that it was because of this insistence of the Trustee that the Pennsylvania Company did keep up the insurance until it passed into the Receiver's hands, and that the Receiver himself pursued the same course (Rec., pp. 427, 465).

Of course when Kann took posession of the property in July, 1894, subject to the mortgage, he knew all about the insurance. Stoner had notified him (Rec. p. 425). Kann, it will be remembered, had become stockholder, director and treasurer of the mortgagor company in December, 1893, and January, 1894. He had also become a large creditor of the Company under circumstances of a peculiar nature, and presently, by his threats and proceedings against it, drove it into the hands of a Receiver, and deprived it of the power of continuing to carry out the insurance covenant. The

Receiver considered his own active duties at an end when he sold the property and deeded it to Kann. So that after July 2nd, 1894, when the mortgagor company's policies, and the policies of the Receiver for the mortgagee's benefit, had expired by their terms, there ceased to be any insurance in terms for the protection of the mortgage, and the insurance covenant was then violated by the *mortgagor* company. That violation still continues. Never since then has a dollar of insurance been taken out by the mortgagor company or the receiver, although, as we shall soon point out, the Trustee continued its former insistence upon the fulfilment of the covenant, and served written notice of that insistence on the *mortgagor* Company and the Receiver, as well as on Kann himself, the real party in interest, and on the defendant, the Penn Plate Glass Company.

Kann, once in possession, immediately took the ground that he would not insure for the benefit of the Trustee. He held the property personally for a year, from July 2, 1894, to July 1, 1895. As admitted in the answer to the supplemental bill, both he and his new Penn Company, organized by him, refused to insure for the benefit of the bondholders although requested so to do by the Trustee.

"They admit that long before the original bill was filed in the case, they gave distinct, repeated and written notices to the said plaintiff that they were not bound to insure the said premises for the benefit of the plaintiff, and that they would not nor would either of them insure the said premises for the benefit of the plaintiff as Trustee, and of the bondholders secured by the said mortgage * * *, and they admit that they did not preserve existing insurance or effect new insurances for the benefit of the bondholders secured by the said mortgage" (Rec., pp. 401–402).

This admission is coupled with the further

admission that both Kann and the Penn Company had full, actual and complete notice at the time of taking the property of all the provisions, covenants and stipulations of the mortgage including those relating to insurance.

With the defaults above outlined in the performance of the insurance covenant of the mortgage in existence on the part of the MORTGAGOR COMPANY, the Receiver, W. L. Kann, and the Penn Plate Glass Company, the Trustee demanded in writing the performance of that covenant by all the above parties and thus availed itself of the right to "require the same to be done," expressly reserved to it in the mortgage.

That demand was made by written notice dated November 29th, 1895, served by the Farmers' Loan and Trust Company, on Joseph W. Stoner, Receiver of the Pennsylvania Plate Glass Company; on Philip Semmer, President of the Pennsylvania Plate Glass Company; on W. L. Kann, personally, and on W. L. Kann, President of the Penn Plate Glass Company; (Rec., pp. 446 467).

Now, this being the state of affairs, and the parties above named persisting, in spite of the written demand, in violating the insurance covenant, and default in the payment of coupons having occurred, the Trust Company declared the principal of the bonds to be due, and filed its original bill to foreclose the mortgage. This bill was filed on the 8th day of July, 1896, *at which time more than six months had elapsed since the serving of the written demands for insurance as above stated at the end of November, 1895.*

Immediately upon the filing of the bill,—which prayed, among other things, that

"your orator may be placed in possession of the mortgaged premises personally, or that a Receiver may be appointed in this cause of all and singular the rights, franchises and property, of every name and nature, of the said defendant the Pennsylvania Plate Glass Company, with power and authority to operate said plate glass works and carry out the business of said mortgagor company under the protection of this Court, with all the usual powers and duties of Receivers in such cases."

—the complainant made the motion for a Receiver, already described, filing with the Court as part of the motion papers the written demands for insurance referred to above. *The defendants Kann and the Penn Company being identical in interest were present by their attorney—the same attorney.* The motion was strenuously opposed by him on behalf of his clients, he appearing in this double capacity; and by reason of this opposition the motion was denied by the Court, on the ground that the Penn Company was solvent and able to take care of the property, a company in default in the payment of $250,000 of bonds and several instalments of interest, HAVING DELIBERATEEY DEFAULTED IN THE PAYMENT OF EACH INTEREST FROM THE VERY DAY WHEN THE TITLE TO THE PROPERTY WAS PLACED IN IT BY KANN.

The defendants filed a bond at the time of the receivership motion, by which it was agreed by the defendant Kann and by Mr. Wertheimer that if any obligation should be shown to exist on the part of the Penn Company to insure for the benefit of the mortgagee, the insurance taken out by *the Penn Company* should be applied to the payment thereof.

This bond clearly subjects the Penn Company's insurance to the lien of the mortgage if the Penn Company for any reason had become obligated to

insure for the benefit of the mortgagee. WE DO NOT DEEM THE BOND VERY MATERIAL, AS WE THINK THE EQUITABLE LIEN OF THE MORTGAGE ATTACHES TO THE PENN COMPANY'S INSURANCE WITHOUT REGARD TO ANY BOND. The agreement in question, however, still further subjects that insurance to the mortgage lien.

Nor is the *time* of the taking out of the Penn Company's policies immaterial. But even if it were material, there is no evidence in the case showing that Judge Buffington was wrong in his statement that a large part of the Penn Company's insurance was placed after the motion for a Receiver had been made. In any event the trustee's demands for insurance antedated the motion for a Receiver, the organization of the Penn Company, and the purchase of the property by it. Those demands continued throughout all the transactions, and no insurance was ever effected by the Penn Company until long after it had been repeatedly requested by the trustee to insure for its benefit, and had refused to do so.

Coming back now to the thread of our argument under this point, we have shown above, (1), a covenant or stipulation in the mortgage and by the mortgagor company to insure; (2), a provision in the mortgage that upon a breach of this covenant by the mortgagor and the continuance of the breach for six months after demand by the trustee for the performance of the covenant, the trustee could seize the property or foreclose the mortgage; (3), a breach of the covenant by the *mortgagor;* (4), a written demand by the trustee for the performance of the covenant; (5), a continuance of the breach for six months after that demand; (6), a similar demand ad-

dressed to the defendant Kann and the Penn Company who had bought the property subject to the mortgage for a nominal sum, and had been instrumental in producing the insolvency of the mortgagor company which resulted in the sale; (7), the bringing of a foreclosure suit by the Trust Company, praying to be put in possession personally, or through a Receiver; (8), an attempt by the trustee to take possession through a Receiver, based in large part upon the necessity for insurance; (9), the frustration of that attempt by the Penn Company, the purchaser subject to the mortgage under peculiar circumstances and for a nominal consideration, and the retention of the plant's income by it and the application of such income to the procurement of insurance, not in terms for the benefit of the trustee; (10), an agreement, given on behalf of the Penn Company in order *to prevent our possession*, undertaking to pay any obligation to insure for the benefit of the mortgagee which might be declared to exist out of the Penn Company's own insurance; (11), a subsequent destruction of the property by fire, while the trustee was being kept out of possession and was being obstructed in obtaining a decree of foreclosure and sale through defenses by *the Penn Company*, which defenses that company has now abandoned as untenable.

This argument does not in any sense rest upon a theory of *personal* or *individual* liability to pay the bonds or to perform the covenants on the part of the mortgagor company, or any one else; nor yet upon any theory of covenants running with the land. Should opposing counsel rest an argument on those points, whatever its merits or demerits, the argument can have no application to the present controversy. The above claim rests on the right accorded to the trustee by the mortgage to *foreclose or take possession* in case of a breach

of the covenant by the mortgagor, who *has* broken it. It rests on the right of the trustee to enforce the *lien* of the mortgage for such a breach of the covenant; and our contention is that under the circumstances outlined above, the property having been destroyed, the *lien* of the mortgage *is* capable of enforcement against, and must be impressed upon, the insurance fund, substituted for the lost property.

THIRD.

The History of the Destruction of the old Company and the Organization of the new discloses Circumstances which make it inequitable for the Defendants to receive the insurance as against the Mortgagee.

We come now to another view of the case under the supplemental bill. There is, in fact, an identity of interest in the parties with whom we are dealing which equity will recognize. The old Pennsylvania Plate Glass Company was apparently a solvent concern, fulfilling its duties under the mortgage until its officers met the defendant William L. Kann. After making himself owner of its property under the circumstances already recounted he proceeded to organize the Penn Plate Glass Company, and to hold the property. But no Court of Equity can fail to see the true situation. It is Kann and no one else who is fighting for this insurance money to-day, whether he appears in the name of the defaulting corporation or in his own name.

Our contention does not rest upon any theory of covenants running with the land.

Whatever would have been the effect of the covenant as to insurance if *strangers* not cognizant of the facts had purchased the property at the Receiver's sale, we assert that under the existing circumstances, Kann and the Penn Company stand in the place and stead of the Mortgagor Company itself, and must be held bound by the covenant to insure, not perhaps to the extent of being obliged to respond in a court of law, but surely a court of equity which has these insurance funds in its hands.

We have already shown that the old company and its Receiver recognized and fulfilled the obligation to insure the property, and that when Kann bought in June, 1894, insurance existed to his knowledge for a large amount in favor of the trustee, which he allowed to lapse.

But even before that date, and in 1893, Kann had become associated with the Pennsylvania Company. We call the Court's especial attention to Kann's own testimony before he knew how it might be used against him. He was called by the defendants under the original bill *before the fire occurred*, and gave the following testimony about his connection with the original company. He was first approached, he says, in the early part of 1893 by Mr. Semmer, who was largely interested in the company (Rec., p. 359). He then had made no loans to the company (*Ib.*). But in December of that year he became its creditor by lending it money, and, in fact, discounting for it a note of $3,500 (*Ib.*, pp. 353-359). Prior to the making of this loan, as he testifies, he was handed a statement by the officers of the company purporting to show their financial condition (*Ib.*, p. 353). This statement, together with other statements made by the officers at about the same time, purporting to

show that the company was in a flourishing condition and was making money notwithstanding a prolonged strike and notwithstanding the additional fact that the panic of 1893 was affecting all business, was what induced Mr. Kann, as he testifies, to advance money in November, 1893, and to "become interested in the company" (*Ib.*, p. 354). On the strength of that statement he declares he "became interested in the company" (*Ib.*, p. 354), "*agreeing to identify*" himself with it (*Ib.*, p. 359), and was elected an officer (*Ib.*, p. 354), director and treasurer of the Company. "I accepted the position," he says, "predicated on that statement in open meeting that if that statement was true, and they could substantiate it, that I would accept the position which they had elected me to—as treasurer of the Company, and if, upon examination of their books, which I asked ten days' time to do, if the examination proved that that was true, I would accept it" (*Ib.*, p. 354).

The election took place January 10th, 1894, and, as he testifies, he accepted the position with the understanding above set forth (*Ib.*, p. 360). Two days from his election, on January 12th, 1894, he went to Irwin, where the works were, and proceeded to investigate the books of the Company, with every opportunity given him to examine them (*Ib.*, p. 360). *He found that the Company was not solvent*; on the contrary, that it was, and always had been, insolvent. He says: "*At that time* I had evidence that they had always been so from the inception of their business" (*Ib.*, p. 357). The deficiency, according to him, amounted to upwards of $119,000 (*Ib.*, 357). Immediately, on the same day, January 12th, he tendered his resignation, as he says (*Ib.*, p. 360). The Executive Committee was called at his instance on that day (*Ib.*), but somehow he didn't get his resignation accepted, and was still holding over as treas-

urer of the Company on March 15th, 1894 (*Ib.*, p. 361).

It may perhaps be considered surprising that this man who had been so uneasy about becoming connected with the company, which he now knew to be absolutely insolvent, should have continued to hold over as treasurer after his discovery of the insolvency, from January 12th until March 15th—two entire months. It must be remembered that at that time his loans to the company were quite small, a few thousand dollars at the most; and if he is to be believed, his holding of the company's stock consisted of a single share, transferred to him by Cowen or Semmer, for which he never paid (*Ib.*, p. 359). So that he could have had no *personal* reason for holding over, no necessity to stay there for *the protection of his own interests.* Of these circumstances he makes two explanations, widely different from each other, and both very odd, to say the least. The first is that he held over under protest, because the officers of the company claimed "that they had then an offer to sell out one-third of the controlling interest in that plant for a very large sum of money, and they pressed me to take no arbitrary steps until they could consummate that, when they would relieve me of the position and pay me back the money which I had advanced" (*Ib.*, p. 354). This explanation throws an interesting light on his ideas as to business propriety. According to the above statement, which is in his own words, knowing that this company was hopelessly insolvent, and had been so from the beginning, he was nevertheless willing to aid those interested in it in foisting one-third of the controlling interest in the plant on *somebody* "for a large sum of money." To assure the success of this nefarious scheme, he wants us to undrstand that he was willing to re-

main treasurer of the insolvent corporation for a while.

His other explanation is so weak that we are led to realize the trouble he was in to explain his strange connection with a company which he claimed to be insolvent. And perhaps we may be able later on to point out who the *somebody* was with whom the negotiations were pending. Meanwhile, we will have to be content with this explanation of his holding over, unless, indeed, we adopt the second, which is to the effect that the directors were having great difficulty in getting a meeting because they were in such straits "that you couldn't get them together" (*Ib.*, pp. 360, 361).

Be these matters as they may, Kann, by his own testimony, remained treasurer of the company two months after he knew that it was and always had been insolvent. Now, did he, as one would naturally suppose, *cease* lending money to this insolvent concern from which he was so eager to get loose, and in which he had so little capital invested? Not at all. He actually proceeded to advance them "further moneys in January and February, 1894" (*Ib.*, p. 353), and lent them altogether "$42,500 between December and February" (*Ib.*, p. 359). This was certainly very extraordinary and would, indeed, seem foolhardy but for the fact that Mr. Kann, being apparently a very shrewd business man, who saw far ahead, was careful to take security for his loans. With the exception of the discount of the $3,500 note, with which he had opened his account with the company, the $42,500 loaned by him was, as he testifies, "in cash, on promise to deliver to me, and they did deliver to me, judgment notes of the company" (*Ib.*, p. 359).

But, somehow or other, the company, although insolvent, seems to have held its own, and we do

not find that any other creditors were pressing it for payment. But Kann resorted to severe measures. The company was evidently at his mercy, so its directors authorized the commencement of a suit to wind up its affairs. In this suit in the Westmoreland County Court the company went into the hands of Joseph W. Stoner, as Receiver, in March, 1894 (*Ib.*, p. 354). In June, 1894, the Receiver, by the order of the Court, sold the property subject to the mortgage, and Kann bought in the property, as has been stated, subject to the existing mortgage of $250,000 for $37,500, bidding it up against other bidders, and outbidding the highest bidder by $500, thus showing that he was very desirous of getting the property. He had at this time reduced his claims against the company largely to judgments. He thinks he had a judgment for the whole amount, but as to the actual amount of the judgment he is not quite sure (*Ib.*, p. 361).

It was pretty quick work. In December Kann made his first advance of $3,500. In January he discovered the insolvency, but nevertheless advanced more. In February he enforced his securities. In March the Receiver was appointed and in June Kann was the owner of the property.

After the supplemental bill was filed, Semmer was recalled by the complainants and closely examined as to these transactions.

Semmer showed that he had personally been connected with the mortgagor company in various capacities from the beginning, and was president in 1893 and 1894. He first became acquainted with Kann in the fall of 1893, and in the beginning of 1894 Kann was elected director and treasurer (Rec., p. 411). This election was held on January 10th, 1894 (Rec., p. 413). Before Kann became director and treasurer, Semmer says, there was an agreement entered into between Kann and some of the

stockholders a verbal agreement. These stockholders were represented by Semmer and Cowen. Semmer practically handled the entire negotiations (Rec., pp. 411-412), which were held in the latter part of 1893 at New York, Irwin and Pittsburgh (*Ib.*, p. 412). These stockholders, it seems, were very hard pressed for money. The panic was on, and they were looking for somebody to provide additional funds. Kann appeared with an evident desire to go into the Plate Glass business (*Ib.*, p. 412), and they finally entered into an agreement with him to give him one-third of the controlling stock provided he would furnish the company with the needed money—$100,000 was needed, certainly—and he agreed to furnish this money provided that Semmer and Cowen would assign to him one-third of their joint holdings of the controlling stock interest (*Ib.*, p. 412). With this testimony before us we begin to find out who the *somebody* was who, as Kann had tes ified, was negotiating for one-third of the controlling interest, and *because of whose negotiations he, Kann, consented to continue treasurer of the company, although he knew it was insolvent.*

Carrying out the agreement, Cowen and Semmer transferred to Kann one-third of the controlling interest, amounting to $86,000 in stock (*Ib.*, 412), and the actual stubs of the certificates so transferred and the record of the transfers on January 19th, 1894, may be seen in the exhibits offered by us on pages 441-442 of the Record. It is interesting to compare this proof with Kann's own statement already recited that he never had but *one* share in this corporation. Kann also acted in pursuance of the agreement between himself and Cowen and Semmer. He accepted "the directorship and financial management" at the annual election (Rec., p. 413) in January, 1894, and advanced some $38,500 in the first six weeks of his connection (*Ib.*, p. 413).

None of this was advanced before he was elected (*Ib*). This is in strict accord with Kann's own testimony already quoted, and it will be recalled that within two days after his election, and consequently before he made these advances, as he admitted, he knew the company was insolvent.

Now, these amounts were advanced by Kann on the understanding that he was to endorse with Semmer the company's notes, receiving by way of protection judgment notes from the company. He obtained *an option from the company on the unsold preferred stock*, amounting to about $106,000, and the understanding was that, when he had paid for this stock, the proceeds of such sale should be used to pay the notes as endorsed (*Ib.*, pp. 413-414). Under this arrangement a judgment note for $10,000 was issued to Kann, but judgment notes were refused him as to the balance of the $38,500, because, after advancing that much, *he declined to advance any more, unless Cowen and Semmer would assign to him the balance of their stock* (*Ib.*, p. 414). Thus Kann was gradually seeking to get absolute control of the company. A treasurer and director, with one-third of the controlling interest in the stock in hand, with an option on $100,000 preferred stock, with a judgment note for $10,000, and other claims amounting to $36,500, and with the company insolvent and in dire need of money, he expected to be able to force these parties to hand over to him the balance of the controlling stock. This extraordinary demand was made within three or four weeks after January 10th, 1894 (Rec., p. 414).

Upon the refusal of Cowen and Semmer to comply with this demand, Kann entered his $10,000 judgment note (*Ib.*, p. 415). The sheriff took possession on March 14th, and the directors of the company hastened to call a meeting, when it was decided that the only thing to be done was to have

a Receiver appointed. The application to the Westmoreland Court for a Receiver was accordingly made. This followed immediately the entry of Kann's $10,000 judgment note. The application would never have been made but for that. "Otherwise the company was in no immediate stress, excepting the pressure brought on by Mr. Kann," says Semmer (Rec., p. 415). After the Receiver was appointed, Kann brought suit for the balance of the $38,600 not represented by judgment notes, seeking to reach the remaining moneys in the hands of the Receiver. *He attached, moreover, $15,000 or $16,000 of the company's money in New York, its money in the hands of its selling agent, Hutkoff, and its money in the People's Bank* (*Ib.*, pp. 415-416).

This, with Kann's own testimony already quoted, forms complete proof of the allegations of the supplemental bill as to Kann's proceedings in connection with the mortgagor company, which resulted in the wrecking of that company, the depriving it of its property, the prevention of the fulfillment of its covenants and obligations and the transfer of its property to himself. That he laid his plans and proceeded with a view to obtaining control of the property in one way or another, is beyond question in view of the evidence. Failing to get possession by means of a controlling interest in the stock, he had recourse to other and more drastic measures which but await the decision of this Court to be deservedly defeated.

Kann's counsel subjected Semmer to a vigorous cross-examination, but did not succeed in shaking his testimony. The cross-examination will be found on pages 443 to 463 of the Record. On this cross-examination Mr. Semmer testified that his arrangement with Kann was a private matter, of which the mortgagor company had only partial

notice (Rec., pp. 443-445). Mr. Schoyer again referred to the statement (Ex. No. 21) already mentioned by Kann, whereby, as defendants allege, an actual loss of $119,000 was changed to an apparent profit of $25,000, and cross-examined Semmer with a view to showing that, as Kann had testified, this statement had been shown him by Semmer at the time he, Kann, became connected with the company (Rec., pp 448 450). We may say in passing, that this much talked of statement was a very harmless affair after all, and that the theory upon which it was drawn was proved to be perfectly accurate by the witness Marthens (Rec., Vol. 1, pp. 330-332). But whether such statement was presented or not, and whether it had the effect ascribed to it or not, the fact remains that after the 10th of January Kann had full access to the books and learned that the company was insolvent, and nevertheless continued to act as treasurer and director (from which offices he has never to this day been relieved) and to advance moneys in the sum of $38,500.

One thing brought out by the cross-examination of Semmer was a proposition made by Kann after his original agreement with Semmer and Cowen, at Mr. Schoyer's office, by which the control of the company was to be placed in the hands of Kann at once in consideration of further advances by him. Mr. Schoyer's understanding of that proposition is set forth in the form of a question on page 453 of the Record. Semmer, however, testified that he flatly refused to accept that proposition because it was altogether one-sided—that by it Kann was to get every advantage, and Semmer and Cowen practically nothing (Rec., pp. 454-457). "Mr. Kann," says Semmer, "kept threatening to close us up unless we would assign him the entire controlling interest of the concern" (*Ib.*, p. 455). "Our directors never held a meeting for the purpose of

having a Receiver appointed until Mr. Kann had entered judgment " (*Ib.*, p. 463).

Now, *after Kann had heard the above testimony and for the purpose of rebutting it, he himself was called by the respondents and gave more testimony.* His former testimony, already summarized by us, will be remembered in connection with this. He reiterates his election as treasurer on January 10th, 1894, and his continuance in that office " under protest " until March, when the property passed into the Receiver's hands (Rec. p. 472); also the fact that he examined the books and learned of the company's insolvency within a few days after his election (*Ib.*, p. 473). On page 474 he says: "The only arrangements I ever had to advance any money was after I became or took the position of treasurer." This, as we have seen, differs somewhat from the facts as testified to by Semmer, *and as testified to by Kann himself on his former examination*, when he showed that his advances had begun in December, 1893. But it is another strong announcement of the fact that the bulk of his advances were made *after* he became treasurer—that is, after he knew that the company was insolvent. He admits having received the $10,000 judgment note (Rec., p. 474). The amount of his advances is again fixed at $38,000, exclusive of the note for $3,500, which he had discounted before he became treasurer (*Ib.*, p. 475). He then states the proceedings which resulted in his entering judgment against the company on March 15th, 1894, and the appointment of a Receiver on the 19th of that month (*Ib.* p. 475). He obtained judgment for the rest of his claim (*Ib.*, p. 475). which was entered as of March, 16th, 1894 (*Ib.*) —and was largely satisfied, as Stoner's testimony will show, out of property of the mortgagor company other than the mortgaged property—and he

bid in the property at the Receivers's sale in June for $37,500 (p. 476). When asked by Mr. Schoyer about the statements of Semmer concerning the arrangement with Kann to advance $100,000, Kann was very careful in framing his denial of the truth of those statements. Read his denials (Rec., pp. 476-477), and it will be seen that he only denies that arrangements to advance moneys were made "*preliminarily*"—"*before he got a resolution of* "*the executive board of the company to give him* "*judgment notes*"—which was in early January, 1894. His denials at this point amounted to no more than a declaration that he had been smart enough to make no advances—no promises of advances—until he got a resolution of the company to give him *judgment* notes. What he was aiming at was the security. He says that he undertook to "accept their proposition" (that is, Semmer and Cowen's proposition), if his examination of the books showed that the Company was solvent (Rec., p. 476). He found that the Company was *not* solvent, nevertheless, apparently, he *did* accept their proposition, for he went ahead and advanced $38,500, getting a judgment note for $10,000 of the same. "They were hopelessly and totally insolvent," he says on the 1st of January, 1894 (Rec., p. 477).

On pages 477 and 479 he offers an explanation of the transfer of stock to him from Semmer and Cowen, which, according to him, was effected under the arrangement at Mr. Schoyer's office in February, 1894—the one referred to by Semmer as utterly one-sided in favor of Kann and which Semmer says was declined altogether. The preceding arrangement Kann denies. He says the arrangement of February, 1894, fell through, and that, *while he holds the stock*, he holds it only as a portion of the company's records (Rec., p. 478). It was stock formerly belonging to Cowen and Semmer, transferred to Kann under one arrangement or

another, and yet Kann says here that he holds it *for the company*. What has the *company* to do with it? The truth is, Kann is trying here to explain his *possession of this stock*, although, as he states, the arrangement fell through. It makes no difference to us whether the agreement between Kann and Semmer, by which Kann got this stock and advanced moneys, was made before or after he was elected treasurer—at Mr. Schoyer's office or out of it—the *fact* upon which we rely and which is proved by Semmer, by Kann and by all the evidence, is that Kann *did* contract in the beginning of 1894, when he knew the company was insolvent, and when he was becoming a large creditor of the company, to get a controlling interest in the stock, and to obtain judgment notes of the company. The Court will draw its own inferences from his first allegation that he never held but one share of stock, and his subsequent admission in view of the tell-tale stubs that he held one-third of the entire issue, and from other inconsistencies between his first and second explanations.

Of course Mr. Kann was given an opportunity to deny specifically and *seriatim* the various charges brought against him in connection with his proceedings at this time (Rec., pp. 479-482). His denials will have to be taken for what they are worth, and in comparison with the rest of the evidence.

Cross examined as to why Semmer had refused to sign any more judgment notes after the first $10,000, Kann could only say that Semmer wouldn't sign—said he wouldn't (Rec., p. 483). Is this more probable than the clear explanation of his own refusal given by Semmer himself?

Cross-examined as to the issue of the certificates transferred to him by Cowen and Semmer, Kann showed that the stock books were at his own office; that the certificates were in the handwriting

of his own bookkeeper (p. 483). The balance of the cross-examination will be found on pages 485–489 of the Record, and we refer the Court to it *in extenso*.

We must also leave the Court to refer to the Record for the testimony of Stoner, corroborating some of the above facts surrounding Kann's acquisition of the property (Rec., pp. 419–437) We have already devoted too much space to the discussion of a phase of the case which the evidence leaves without a doubt—the relations of Kann to the old company. That he wrecked that company and obtained its property at a nominal price and in pursuance of a scheme laid out from the beginning, is proved as surely as anything ever was proved. We will now proceed to show that the Penn Company is merely another name for Kann.

If no other proof of this were in the case, it would be sufficient to point to the consideration named in the deed to the Penn Company—$83,500, consisting, as Kann himself testifies (Rec., p 362), of "just exactly what it cost" him; * * * "that is" (he says) "the $37,500, six per cent. interest added on to the purchase money up to the time, plus the improvements which I had made and paid for, they assuming * * * the unpaid portion of those contracts not paid for yet on the improvements, less $10,000."

But there is abundant proof of the identity of the Penn Company with Kann, in his own testimony.

"*I subsequently formed a corporation* known as the Penn Plate Glass Company and sold them the property" (Kann's testimony, Rec., p. 355).

This company, it seems, he himself "organized" about a year after he had bought the property, and he "turned over" the property to it (Rec., Vol. I, p. 361), and has "managed that

plant ever since it has been operated * * * since it has been a corporation." He is "now president and manager of that company" (Rec., pp. 358-359).

Mr. Stoner's testimony also proves the identity of Kann and the Penn Company. Kann divulged to him his intention of organizing the company about six months after he had bought it (Rec., p. 425). Kann was a charter member, and so were all his friends—Dreyfus, Rosenthal, Kerr, Wertheimer and Stoner (*Ib.*, p, 526), the latter of whom became a charter member at the solicitation of the others, and took ten shares of the stock (*Ib.*, pp. 425-426). He subsequently parted with them, but at a price which he refused to state (*Ib.*, p. 436).

Another proof of the identity of Kann with the Penn Company is the fact that he so vigorously defended his suit. Having parted with the property, and been paid, as he declares, all he disbursed upon it while in personal possession, there could be no good reason for him to join in defense of the Penn Company unless his interests in the latter were so great as practically to identify him with it. Moreover, he, together with Mr. Wertheimer, went upon the insurance bond filed in this case whereby he obligates *himself* to pay the insurance (if the Court so decides) out of the *Penn Company's insurance* Indeed, it is unnecessary to continue calling attention to the numerous proofs of the Penn Company's identity with Kann, and we shall now simply assume that it has been proved by the whole course and conduct of this suit, and shall proceed to discuss, in conclusion, a few principles of law which we think bear upon the relief prayed for in the Supplemental Bill.

We contend that there is an irrebuttable presumption that the insurance which has been effected to the Penn Plate Glass Company extends to and covers the interests of the trustee.

"It is a fundamental principle that equity imputes an intention to fulfill an obligation. The meaning of this is that when one acquires an interest in property and is under some obligation in respect thereto to another, though in acquiring the same he expressed no intention of fulfilling the obligation, equity will impute such an intention and will erect an equitable estate or interest in the subject-matter in favor of the person to whom the obligation is owing."

Beach on Modern Eq. Juris., §24.

The complainant has no adequate remedy at law for the procurement of the relief to which it is plainly entitled. The provisions of the mortgage, when taken in connection with the manner in which the property has been acquired by the defendant, the Penn Plate Glass Company, create an implied contract, enforceable in equity, on the part of the Penn Plate Glass Company, to insure for the benefit of the bondholders and the trustee. The insurance which has actually been effected by the Penn Plate Glass Company, in whatever terms the policies may be couched, must be presumed by a Court of equity to have been in fulfillment of this obligation. And in view of the accident which has wiped out so large a part of the mortgage security, it would be a violation of good conscience for the Penn Plate Glass Company to retain the full benefit of the policies obtained by it. The trustees and bondholders should therefore be decreed in equity to have a lien upon those policies to the extent of their loss.

It does not meet our contentions for the appellant to say that the plaintiff and the bondholders had insurable interests in the property, which they might have covered by effecting insurance themselves; and that, in a suit at law upon the covenant, the damages, if any, would have been simply the cost of the insurance. This is not a suit at

law, but a bill in equity, filed after the loss of the property, at a time when the insurance could not be effected by the trustee, which, moreover, *never was in possession of any funds* which it might have used to effect insurance, and the mortgage never contemplated that it would be.

We are not arguing in this point that the covenant of the mortgagor to insure for our benefit is binding upon an innocent stranger purchasing the mortgaged property. We think the facts set forth in the supplemental bill and proved by the evidence demonstrate that the present owner of this plant, the Penn Plate Glass Company, is not an innocent owner of this property, but became such owner under circumstances which estop it from denying its obligations to insure for the benefit of the bondholders, and render it inequitable that it should retain the whole benefit of the insurance effected by it upon the destroyed property. It would be a miscarriage of justice if such a man as the defendant Kann could with impunity, upon becoming the owner of mortgaged property by the methods pursued in this case, permit the existing insurance of the mortgagee's interest to die out, and, by reorganizing the company, and issuing new insurance in a new name, deprive the mortgagee altogether of the benefit of insurance—and this, particularly, when the loss has occurred during a protracted period of obstruction by him and his reorganized company of the mortgagee's matured right to possession of the property and a sale under foreclosure. It must not be forgotten that the principal as well as the interest upon these bonds is now due, *and has been due since the beginning of 1896*, and that the fire occurring in April of 1898 destroyed property which was *already* subjected to a *matured* mortgage debt of nearly three hundred thousand dollars, and against which the lien of the mortgagee was in process of enforce-

ment. As early as 1896 the trustee had asked the Court to take possession of the property through a Receiver. These facts are of extreme importance. It is not as if the trustee were here asking a Court of *law* to fix the obligation of this insurance covenant upon a purchaser—even such a purchaser as the Penn Company—at a time when nothing was due under the mortgage, and before a fire had occurred, and before the lien of the mortgage had matured and was in process of enforcement. *For all equitable purposes the mortgagee was the owner of the property at the time when it was destroyed.* The title, of course, remained in the Penn Company, and would remain there until a deed under a foreclosure sale. Indeed, the title would never vest in the mortgagee unless it saw fit to purchase at the sale. But its right, to the extent of the mortgage debt, to every dollar of *value* in the property up to the extent of its mortgage had accrued and was matured at the time of the first default. Its right to a sale matured months before the destruction of the property, and every dollar of the proceeds of sale, representing the *value* of the property, would have belonged to the mortgagee up to the amount of the mortgage debt.

The fact that a *decree* had not yet been entered cannot alter these facts. A decree does not *create* the rights of the mortgagee, it only declares them. Its effect is simply to *execute* the contract of the parties, and to enforce their several rights as they already exist. Hence, looked at from any point of view, it is impossible for the defendants to deny that the property, from the destruction of which they expect to reap such benefits in the collection of insurance, was, so far as its *value* was concerned, the property of the complainant. It is no answer to this to say that the insurance was only intended to cover the defendant's *equity* in the property.

In the first place, the respondents are not proceeding on that theory, *because they are collecting the value, not of such equity as they may have,* BUT OF THE ENTIRE DESTROYED PROPERTY. And in the next place, it must be remembered that long before the fire occurred the defendants had, in equity, as between them and the mortgagee, ceased to have any insurable interest in the property, or indeed any interest in it whatever. We cannot insist too earnestly on this point. When the defaults occurred under the mortgage, and the trustees' right to a sale of the property matured, the mortgagor immediately ceased to have any tangible interest in this property *as against the mortgagee.* The entry of a decree would add nothing to the basic rights of the parties. And when it is further remembered that a decree would have been entered as far back as 1896 *but for the obstructive defenses interposed by the defendants Kann and the Penn Company, which they have now abandoned,* we submit, the Court should not hesitate judicially to impress the lien of the mortgage upon whatever insurance that company is entitled to. If this is not done, the Penn Company, by reason of its own unwarrantable obstruction of the foreclosure suit, will be able to collect from the insurance companies the *full value,* not simply of an equity of redemption, but of the entire destroyed property, which of right should belong to the mortgagee. But, if that obstructive defense had not been interposed, and if the foreclosure sale had preceded the fire, as it would have done but for that defense, will it be seriously contended that the equity of the Penn Company would have been worth the amount collected on the insurance, or anything like it? That Company bought subject to the mortgage with full notice of the mortgage, and is equitably entitled to obtain nothing out of the mortgaged property until after the mortgage debt

is satisfied. If, therefore, this Court sustains the defense, the Penn Company will *profit* by the fire and become unjustly enriched at the expense of the mortgagee.

The defendants assert that we must point to some contract, express or implied. There is no magic in these terms. A contract implied in law is really no contract at all. It is simply an instance of the operation of the law to prevent the working of a manifest injustice within the forms of law. In certain cases the law will compel a man to perform a duty by implying a promise on his part to perform it. One of the classes of implied contracts is well described by Lord MANSFIELD in *Moses* vs. *MacFarlen* (2 Burr, 1008), where he says:

"If the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt founded in the equity of the plaintiff's case, as it were, upon a contract—*quasi ex contractu*, as the Roman law expresses it."

The instances in which contracts are implied in law are too multitudinous to cite.

"Whenever circumstanres arise in the ordinary business of life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted."

Ex parte Ford (16 Q. B. D., 307).

The equitable foundation of implied contracts is clearly expressed by Pothier in writing upon such contracts in the civil law, from which we derive the principle.

"In contracts it is the consent of the contracting parties which produces the obligation; in *quasi* contracts there is not any consent. The law alone, or natural equity, produces the obligation

by rendering obligatory the *fact* from which it results Therefore these facts are called *quasi* contracts, because without being contracts, they produce obligations *in the same manner as* actual contracts."

Pothier on Obligations, 113.

These authorities indicate the basis upon which is built the broad doctrine of implied contracts. Like constructive trusts, they necessarily depend on the circumstances of each case, and vary as infinitely as the transactions of men. If, then, it is necessary, in order to sustain the equitable lien of this complaint, to have some underlying *contractual* obligation, the facts in the case create a situation from which natural equity compels the implication of a *promise* on the defendants' part to hold a part of these insurance moneys *in trust* for the complainant, and to pay over the same upon the adjustment of its loss.

"That a case is novel, and not clearly within the limits of any adjudged case, does not warrant the denial of relief in equity."

Beach on Modern Equity Jurisprudence, § 1.

And in the case cited in the foot notes by Mr. Beach, p. 2, *Piper* vs. *Hoard* (107 N. Y., 73), the Court says, referring to the facts then before it:

"If the most that can be said is that the case is novel, and is not brought plainly within the limits of some adjudged case, we think such fact not enough to call for a reversal of this judgment. The spectacle of an individual enjoying property acquired by means of an admitted fraud is not one which appeals with any great force to the sympathies of a Court in a civilized land in behalf of the perpetrator of the fraud."

From the above considerations it will be seen

that this bill is not filed upon the narrow contention that the covenant to insure runs with the land. We are not concerned with *that question*. What we do claim is that with this covenant in the mortgage; with the insurance placed by the original company in pursuance of that covenant for the mortgagee's benefit; with Kann identifying himself with the mortgagor company and bringing it to speedy destruction; with the new company nothing but another name for Kann and his interests, and taking the property with full notice of his dealings; with both these parties fully aware of the mortgage, and of its contents, refusing to insure for the trustee's benefit, and deliberately permitting the former insurance to lapse, in spite of the demands of the trustee; finally, with these same parties improperly opposing our settled right to be put in possession through a Receiver, and also obstructing the foreclosure, so that the fire occurred before a decree could be entered, but long after the trustee's rights had matured, and while the mortgage lien was in process of enforcement—with all these facts, we have made out a claim to the insurance effected by the Penn Company without regard to whether that company *intended* that insurance to inure to the benefit of the mortgagee or not.

The ground of our claim is the equitable obligation of the defendants, growing out of their dealings with this property, and it does not in any sense rest upon the *intention* of the Penn Company or Kann. In this connection, we call attention to the argument advanced by the defendants below, that even insurance effected by the *mortgagor* company would not be subject to a lien in favor of the mortgagee, although the mortgage contained a covenant to insure for the mortgagee's benefit, provided the insurance policy contained evidence that it was *not* the intention of the mortgagor to take

out that policy in pursuance of the covenant. The case of *Dunlop* vs. *Avery* (89 N. Y., 502), is cited in support of that argument. But that case does not support it. The Court, on this point, says in the course of its opinion:

"The rule that when the mortgagor covenants to keep the buildings insured for the benefit of the mortgagee, that any insurance that may be effected *in the mortgagor's own name or for the benefit of the mortgagor* will be presumed to be in fulfillment of the covenant is well established, *but this presumption arises only in the absence of proof to the contrary*, and this is not the legal presumption when the policy itself provides for the payment of the loss to *another* incumbrancer."

The defendants understand this to mean that the presence of proof that the insurance was intended by the mortgagor to cover only his *own* interest, *defeats* the presumption of law whereby the insurance is taken to be for the benefit of the mortgagee and a lien in the latter's favor is impressed upon it.

But a moment's reflection will show that that cannot be the meaning of the Court. In the first place, the *Avery* case was a fight between *two incumbrancers*—not between an *incumbrancer* and the *mortgagor*—in which the senior incumbrancer was seeking to wrest from the junior, insurance which the *mortgagor* had effected—not in its *own* name—but in the name of the *junior* incumbrancer. The mortgagor was under covenant to both incumbrancers to insure for their benefit, and it would clearly have been inequitable to give to the first incumbrancer insurance which was in terms the property of the second. That is what the Court held, declining to indulge the presumption above referred to "when the policy itself provides for the payment of the loss to *another incumbrancer*." The Court does not say that the presumption would not be indulged if the policy

provided for the payment of the loss to *the mortgagor*. On the contrary, that is the precise case in which the Court says the presumption *does* hold. The rule is well established, it says, when the insurance is effected "in the *mortgagor's* own name, or for the benefit of the *mortgagor*." And this must, undoubtedly, be the rule; for, otherwise. it would be meaningless. There never would be a case in which the mortgagor could not adduce evidence that he intended the insurance to be for his *own* benefit, and not for the benefit of the mortgagee. The foundation for the rule is that *equity* requires such insurance to be impressed with a lien in favor of the *mortgagee*. The *Avery* case refers to and rests upon the case of *Cromwell* vs. *The Brooklyn Fire Insurance Company*, 44 N. Y., 42, in which the Court, alluding to this old established doctrine, says (p. 47):

"Where the assured has agreed to insure for the protection and indemnity of another person having an interest in the subject of the insurance, then such third person has an *equitable lien*, in case of loss, upon the money due upon the policy to the extent of such interest. These are principles of law well settled."

To claim, as the appellant claims, that the mortgagor can escape from the effect of this equitable lien by simply declaring that the insurance is limited to his *own* interest, is to deprive the rule of all efficacy--indeed, to do away with it altogether, and to permit the mortgagor to destroy the obligation imposed by equity upon him simply by denying the existence of that obligation.

In *Wattengel* v. *Schultz* (11 Misc., 165), which, like the present case, was a foreclosure suit, a mortgage contained a covenant to insure and to assign the policies to the mortgagee. The mortgagor insured the property, but his policies were after-

wards cancelled and he died. Thereupon his administratrix took out new policies payable to the estate of the mortgagor. The property burned down and the insurance companies paid the insurance moneys to the administratrix of the mortgagor. "The deceased did not assign the policies taken out by him to the plaintiff nor was there any reference therein to the plaintiff's mortgage, nor did the plaintiff avail himself of the right given him in the insurance clause of the mortgage to insure the buildings for his own benefit." Upon default, the foreclosure suit was brought, and, among other things, the plaintiff prayed as relief "to have the lien of the mortgage declared upon the insurance moneys in the hands of the administratrix and have the same applied upon the plaintiff's mortgage."

It was argued among other things that the plaintiff had been negligent because of his failure to insure his own interest. But the Court granted the relief prayed :

"The administratrix has money that represents the real estate destroyed that was subject to the lien of the plaintiff's mortgage. * * * The husband's covenant to insure the premises, if not performed in his lifetime, can be enforced against his estate through his personal representatives to the extent of his assets in their hands. * * * In insuring a mortgage interest it *is not the debt* secured by the mortgagee that is insured but the interest of the mortgagee in the property upon which his security rests. * * * And the proceeds of the insurance is to be distributed, when upon real estate, *as real estate*, and not as personal property. * * * The administratrix had the right to execute the covenant of the deceased, and it was her duty to do so, and when she took out the four policies *in the name of the deceased and of his estate*, the presumption is that she did it in the performance of that covenant, and as a continuation to the extent thereof of the insurance that had been effected by the deceased."

In *Cromwell* vs. *The Brooklyn Fire Insurance Company*, already cited, the owner of property agreed to sell it to another, the purchase price to be paid partly in cash and partly by mortgage, it being that the vendee should insure the property and assign the policy to the vendor to protect his vendor's lien. The vendee took possession and insured the property in his own name, loss if any payable to the vendor. But this insurance having come to an end, he renewed the insurance *with the same company, making the loss payable to himself only*. After a fire had destroyed the property, the assignee of the vendor served notice of his claim to an equitable lien on the insurance moneys on the insurance companies which, in spite of the notice, paid over the moneys to the assured (the vendee). In an action against the insurance company brought to enforce the equitable lien of the vendor on the insurance, the Court sustained the lien, and compelled the insurance company to pay the loss *over again* to the vendor's assignee.

"The plaintiff," said the Court, "notified the company of his equitable lien to the insurance money before payment to Eichenlaube (the vendee). After such notice the company made the payment at its peril. * * * The company assumed the hazard of resisting the equity claimed by the plaintiff. * * * This claim does not operate as an assignment of the policy, against which the company by a condition of that instrument stipulated. They became, *by reason of the facts*, and the notice given by Cromwell, *trustees of a fund which they were equitably bound to pay to the party justly entitled*. The party entitled in this case was the plaintiff" (the vendor's assignee).

These cases show that even under the most unusual circumstances, where no doubt could exist that the assured was claiming the full benefit of the policies and seeking to deprive the mortgagee

of them altogether, the Court will nevertheless presume that the policies inured to the benefit of the mortgagee and impress his equitable lien upon them.

The case of *Louden* vs. *Waddle* (98 Pa. St., 242), has not the slightest application to the present controversy. There was no question of covenants to insure in that case—it was not even a case of insurance effected by a mortgagor. The facts before the Court in *Louden* vs. *Waddle* were these: Certain administrators mortgaged a piece of real estate to their intestate's widow. She thus became *mortgagee* of a piece of property in which she also had a dower right. *She* insured her interest in this property and upon a loss collected the insurance. The question was whether this insurance could be considered as covering the mortgage debt as well as the estate in dower, so that the mortgage could be regarded as paid by the payment of the insurance. How such a case can be cited as an authority in the present discussion we are at a loss to understand.

The case of *Stearns* vs. *Quincy Insurance Company* (124 Mass., 61), does not conflict with the above authorities and reasoning. That was a case of a covenant in a mortgage which made it incumbent upon the mortgagee to examine and approve the insurance effected for his benefit by the mortgagor. It contemplated action by the mortgagee. But the latter appears to have made no inquiry whatever and, indeed, to have had no knowledge of the existence of the insurance at all, until after the loss. Moreover, the condition required that the insurance effected for the benefit of the mortgagee should be for a sum not less than $3,200 (page 64), and the insurance actually taken out by the mortgagor was for only $2,500, only $1,500 of which covered property covered by the mortgage (page 64). All these facts were recited by the

Court and its opinion was expressly based upon them. They make it clear that the mortgagor, in taking out the policies, was only insuring his equity—his own interest in the property—and it would have been plainly inequitable to permit the mortgagee, who had neglected to inquire or to protest or to make any attempt towards the fulfillment of his part of the condition, to seize insurance which was certainly not more than was adequate to cover the mortgagor's own interest. In all these respects the case is directly opposite to the case at bar. Moreover, *Stearns* vs. *Quincy Insurance Company* was not a *cause in equity*. It was an action at law on contract, and the action was brought by the mortgagee *in the name of the mortgagor* on the theory that there had been an equitable assignment of the insurance. In deciding the case the Court took this ground for denying the plaintiff's remedy:

"Assuming that Andrews (the mortgagee) has an equitable claim to that part of the policy which covers the house," said the Court, "yet it is one which he cannot enforce in a suit at law on the policy in the name of Stearns, the mortgagor, because the latter must have an equal right to recover his share in such an action, and the company would be required to pay one loss by installments to different persons and be subject to two suits for the same cause of action, in favor of the same plaintiff."

No such objection can be made to the pending suit, which is upon a bill in equity and all of the parties are before the Court and the relief prayed is cast purposely in a form which will do equity on all sides.

The general rule referred to is well stated in *Wheeler* vs. *Insurance Co.*, (101 U. S., 439, at page 442), where the Supreme Court of the United States says:

"It is settled by many decisions in this country that if the mortgagor is bound by covenant or otherwise to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor to the extent of the mortgagee's interest in the property destroyed. * * * And this equity exists, although the contract provides that in case of the mortgagor's failing to procure and assign such insurance, the mortgagee may procure it at the mortgagor's expense."

From the above authorities, it is clear that if the insurance policies which have been taken out by the appellant, the Penn Plate Glass Company, had been taken out by the original mortgagor, the Pennsylvania Plate Glass Company, the complainant would unquestionably have had an equitable lien upon them to the extent of the loss under the mortgage.

But the defendants claim that this equitable lien does not exist as against policies taken out by the Penn Plate Glass Company, and they found that contention on the doctrine that the covenant does not run with the land. By this they mean that the facts from which equity would draw the right of the mortgagee to a lien on insurance effected by the Pennsylvania Plate Glass Company do not exist where the insurance was effected by the Penn Plate Glass Company. But inasmuch as the whole lien, whether against mortgagor or some third person, rests upon *equitable* inference, it follows that if a *state of facts* exists from which it would be *equitable* to infer a right in the mortgage to a lien on the insurance, that lien will be inferred and impressed upon the insurance, whether the covenant does or does not run with the land. If, as we have endeavored to show, the assured bought subject to the mortgage and with a full knowledge of the insurance covenant and of the mortgagor's then

existing fulfillment thereof, and bought and held the property under circumstances which in equity, deprive it of the right to stand as a *bona fide*, innocent purchaser, and confound it, so to speak, with the original mortgagor itself, then equity must step in, just as in the case of the mortgagor's insurance, and for the same reason, and must impress upon the insurance a lien in favor of the mortgagee.

The case is clearly distinguishable from the case of *Reid* vs. *McCrum* (91 N. Y., 411). In that case, the assured was the innocent owner of the property, absolutely a stranger to the original ownership. He had obtained the property through a number of mesne conveyances, and had no connection with the mortgagor. There were present none of the circumstances which, in the present case, identify the assured with the mortgagor and make it as inequitable for the former as for the latter to deny the lien of the trustee. Moreover, as appears from the statement of facts in the McCrum case (page 413) the fire had there occurred *previous to the foreclosure*, and not, as here, long after the foreclosure was begun and was being obstructed by the defendant. The significance of the fact that the trustee's mortgage lien had already matured before the fire in this case has been amply discussed in preceding portions of this brief, and its effect upon the equities points out a broad ground of distinction between this case and that of *Reid* vs. *McCrum*. That case, however, was argued on behalf of the mortgagee on the theory that the covenant to insure ran with the land, and it was because the Court took an opposite view on that bare point that the mortgagee's contention did not prevail. Here, we do not in any sense rest our claim on the theory that the covenant runs with the land, and the two cases are wholly different. The Court, in *Reid* vs. *McCrum*, referred to *Dunlap* vs.

Avery, already quoted above on another point, and held that the case decided that a covenant to insure does not run with the land, and that, therefore, the matter was *res judicata*, "*unless some reason exists why the case cited should not be followed and adhered to.*" Ref rence to the *Avery* case would not seem to support the view taken of it in the *McCrum* case, that it definitely decided that such a covenant does not run with the land; but, however that may be the Court, by the above-quoted expression, expressly recognizes that there might arise a state of facts upon which it would not be proper to follow the ruling that such a covenant does not run with the land. That such a state of facts exists here we contend, claiming that while, as against a stranger purchasing this property, that covenant might have no effect, it bound the Penn Plate Glass C mpany, which was no stranger, but stood in the shoes of the Mortgagor Company, with even less equity as against the mortgagee than the mortgagor company itself possessed.

FOURTH.

By the Terms of their Purchase, and under the Circumstances of this Case, the Defendants Kann and the Penn Company bought subject to the Mortgage and assumed the Mortgage-Debt, or, at least, agreed to indemnify the Mortgagor against any Liability upon the Covenants of the Mortgage: and the Court below, having Jurisdiction of the Res and of the Parties, had Power, in order to prevent Circuity of Action, to enforce the Obligation by the Decree now appealed from.

We now come to another ground upon which we contend that the decree should be sustained, wholly separate and apart from the grounds already advanced. The principles upon which we have relied in the foregoing points of our brief have had nothing whatever to do with the question as to the assumption of the mortgage debt by the purchaser, or the reciprocal obligations of the mortgagor and the Penn Company. In the present point, for the first time, we take up and discuss the case in that aspect.

The sale of the mortgaged premises to Kann by the Receiver Stoner on June 18th, 1894, was, as we have shown, made subject to the lien of the existing mortgage for $250,000; and the deed given to the purchaser on July 2d, 1894, recited that it was made "subjected to a mortgage made by the said Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of the City of New York for two hundred and fifty thousand dollars

($250,000), dated January 1, 1891, recorded in Westmoreland County, in Mortgage Book 43, page 1."

One year later, and on July 1st, 1895, Kann conveyed the property to the Penn Company by deed, which recited that it was made "subject to a mortgage made by the Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of the City of New York, for two hundred and fifty thousand dollars ($250,000), dated January 1, 1891, recorded in Westmoreland County in Mortgage Book 43, page 1."

It has already been pointed out that the considerations for which these two conveyances were made were $37,500, and $83,500, respectively. And it is admitted in the answer, as alleged in the supplemental bill, that both Kann and the Penn Company had, at the respective times, when they purchased this property, not only the constructive notice given by the explicit mention of the mortgage in their deeds, but full, actual and complete notice of all the provisions, covenants and stipulations of the mortgage, including those relating to insurance.

In the Circuit Court the Penn Company and Kann asserted that in spite of these facts they could hold the mortgaged premises free of the lien of the mortgage. This contention they have now abandoned, and they acquiesce in that part of the decree which directs a sale of the remnants of the mortgaged premises for the benefit of the bondholders. But they still deny that the terms of their purchase, or their actions after coming into possession, have raised any obligation upon their part upon or under the covenants in the mortgage. They deny that they ever assumed the mortgage debt, or that any obligation under the covenant to insure ever arose against them to indemnify the mortgagor in case it should become liable on that covenant. The

object of this point of our brief is to show that they are wrong in those denials.

For the purposes of determining the contract into which these parties have entered, the laws of Pennsylvania govern. Hence, those cases which in other jurisdictions distinguish the expression "*subject to a mortgage*" from the expression "*subject to the payment of a mortgage*" do not apply. The Courts of Pennsylvania, very properly, we think, draw no such distinction.

Blood vs. *Crew Ledick Company*, 171 Pa. St., 328.

Moreover, it must be remembered that this is not a case of an individual's mortgage upon a piece of land, the sale of the equity in which would leave the mortgagor fully as competent to meet the mortgage-debt as he was before such sale. We have here a mortgage made by a *corporation*, not merely upon a piece of land, but upon land, machinery, franchises, rents, issues and profits—in short, upon the entirety of the corporation—upon its whole property and stock in trade, owned at the time of the mortgage, or thereafter to be acquired. And the sale of the equity of redemption at which Kann purchased, was not an ordinary sale by an individual, but a judicial sale, of all the property of every conceivable kind belonging to that corporation made in a proceeding to wind up the corporation's affairs and to put it out of existence. The necessary effect of such a sale is utterly to wipe out the mortgagor corporation, and to destroy, if not its legal existence, at least all its capacity to do business, to raise money or to pay its obligations. And one who knowingly, and with full notice of all the circumstances, purchases subject to such a mortgage, or at such a sale, can hardly be regarded as standing towards the vendor, or

the mortgagee, in the same position as a mere individual purchasing at an ordinary sale subject to an individual's mortgage. The act of such a purchaser of corporate property must obviously result in depriving the mortgagee of all hope of collecting his mortgage—debt from the mortgagor. It must deprive him, moreover, of all hope of receiving the interest on his mortgage out of the income of the plant, except at the will of the purchaser. And if that purchaser is at liberty so to apply the income or not at pleasure, without running any other danger than that of having the property subjected to a foreclosure suit, the door would be opened to very great and very probable wrong to the mortgagee. For the purchaser, safe from personal liability, could mismanage the property at will, absorb its income, leave it unprotected and useless, dismantle it, and then be content to suffer the mortgagee to step in and seize the mere wreck of his security. Such certain evils should never be allowed to occur *in invitum*. The mortgagee is powerless to prevent them. He must stand aside—see his mortgagor swept aside—his security thrown into irresponsible hands—and do nothing. It will readily appear to the Court that, under such circumstances, the *implied* undertaking of a purchaser subject to a mortgage at such a sale must be vastly greater and more binding than in an ordinary case. It cannot be lightly assumed that the Court of Westmoreland County intended, when winding up this corporation and selling its property subject to an acknowledged mortgage, to work such injustice to the mortgagee.

We think it therefore clear, on general principles as well as by virtue of these peculiar elements, that the Penn Company, by purchasing subject to the mortgage, took the property subject to an implied covenant on its part to indemnify the mortgagor

against any liability to which it might be subjected by reason of the mortgage ; and that, inasmuch as by the very terms of its purchase, it knew that the mortgagor was thus rendered powerless for all time to meet such liability, it practically, by purchasing subject to the mortgage, *expressly* agreed to pay the mortgage debt.

Even in the case of ordinary purchases subject to a mortgage, or to the payment of a mortgage, the law in Pennsylvania has always been that by such purchases the vendees at least impliedly agree to indemnify the vendors against liability on the mortgage.

Campbell vs. *Schrum*, 3 Watts, 60 ;
Blank vs. *Garman*, 5 W. & S., 42 ;
Woodward's Appeal, 38 Pa. St., 327 ;
Moore's Appeal, 88 Pa. St., 452.

For a long time a controversy pended in the Courts of Pennsylvania as to whether in every case of a purchase subject to a mortgage the transaction did not import *something more* than this indemnity ; and some authorities held that such purchases *ipso facto* gave rise to an implied covenant, *enforceable by the mortgagee*, to pay the mortgage debt. The last word in this controversy, before it was terminated by the Pennsylvania Act of June 12th, 1878, P. L. page 205, was said in the case last cited above, *Moore's Appeal* (88 Pa. St., 452), which, though decided in 1879, adjudicated claims which arose prior to the passage of the act in question. In that case the Court said :

" An examination of the cases which have been decided on the legal effect of such a clause in a conveyance, shows, we think, that *unless there exist special circumstances to raise a covenant to pay the encumbrance*, it amounts only to an indemnity to the vendor."

And, arguing against the implication of any more extended covenant, the Court said further :

"*Surely something should appear to create the inference of such a covenant.* The words, 'under and subject' import no such thing. They import that the vendee takes the land incumbered, and at most, that in taking it in an agreed consideration which includes the incumbrance, he will indemnify the vendor to the extent of that consideration in the same manner as if it had been paid in cash and so applied as the time."

Thus, then, something *might* appear—*special circumstances might exist*—to raise a covenant to pay the incumbrance. We have already pointed out, both in this division of our brief and in prior divisions, a number of *special circumstances* which tend strongly to raise such a covenant from the purchase subject to our mortgage.

Now, when the act of 1878 was passed it is very plain that its object was to put a quietus upon all this controversy about the meaning of the bare expression "subject to a mortgage" in a deed of the equity. And to use the words of the learned Judge in the Circuit Court's opinion, the act "provided that the under and subject clause *alone* should not be construed to create a personal liability for the debt, that is a direct assumption to the owner, *but left unaffected the implied covenant to indemnity, as between vendor and vendee.*"

The language of the act makes it apparent that this was its sole object :

"Grantees of real estate which is subject to ground rent or bound by mortgage or other incumbrance, shall not be personally liable for the payment of such ground rent, mortgage or other incumbrance unless he shall, by an agreement in writing have expressly assumed a personal liability therefor; or there shall be express words in the deed of conveyance stating that the grant is

made on condition of the grantee assuming such personal liability therefor; *Provided*, that the use of the words 'under and subject to the payment of such ground rent, mortgage or other incumbrance shall not *alone* be construed so as to make such grantee personally liable as aforesaid.'"

The defendant's counsel will argue that this act completely demolished not only the inference of the assumption of the mortgage debt claimed by some authorities to arise from the words "subject to a mortgage," *alone*, but also the inference of an agreement *to indemnify the mortgagor* against liability on the mortgage. We have, however, shown the origin of the act springing from controversy. And the above quotation, when compared with the passages quoted from *Moore's Appeal*, shows that the same idea was uppermost in the minds of the Legislature which swayed the Court in that decision, namely, that while the covenant as to indemnity between vendee and vendor must always be inferred from the bare words "subject to a mortgage" contained in a deed of the equity, yet, those words *alone*, that is, in the absence of *special circumstances*, should no longer be construed by any authority to imply a covenant to assume the mortgage debt. Under the act, as before its passage, the indemnity covenant must always be inferred; under it, as before, when *special circumstances* exist, the covenant to assume the mortgage debt may still be implied; but unless such special circumstances exist, the words "subject to the payment of the mortgage" or either equivalent are not *alone* enough to imply a covenant to assume the mortgage debt, but still continue to be sufficient to imply a covenant to indemnify the mortgagor. That this is the effect of the statute is to be gathered from the decisions in *Lennox* vs. *Brewer*, 160 Pa., St., 193, and *Blood* vs. *Crew Ledick Co.*, 171

Pa. St., 439. In the latter case the question squarely arose whether the Act of 1878 would prevent the enforcement of the implied covenant of indemnity against the vendee at the suit of the vendor, and the Court held that it would not:

"*The Act of 1878 plays no part in this case. The action is not brought by the holder of the mortgage to assert a personal liability against the vendee, and for that reason the act does not apply.*"

IT FOLLOWS FROM THE ABOVE CONSIDERATIONS THAT IF THE SPECIAL CIRCUMSTANCES OF THIS CASE ARE SUCH AS WE CLAIM THEM TO BE, THE LAW WITH THEIR HELP WILL IMPLY FROM THE PURCHASE OF THE PROPERTY SUBJECT TO THE MORTGAGE A COVENANT ON THE PART OF THE DEFENDANT TO PAY THE MORTGAGE. IF, ON THE OTHER HAND, THEY ARE NOT SUCH AS WE CLAIM THEM TO BE, THEN THE LAW WILL STILL IMPLY A COVENANT ON THE PART OF THE DEFENDANT TO INDEMNIFY THE MORTGAGOR AGAINST ALL LIABILITY ON THE MORTGAGE.

Now, with one or the other of the above implied covenants certainly in existence, can it be successfully contended that, under the circumstances of this case, the liability of the vendee did not extend to the mortgage provision as to insurance? We have already seen how that provision was only one of a number of stipulations contained in the mortgage for the better securing of the debt and enforcing of the mortgagor's liability upon it.

"The duty to insure," to quote from the opinion of the Circuit Court, "was incidental and supplemental to the mortgage debt. Its purpose was to make it more secure and insure the payment. As was said by the Supreme Court in *Miller* vs.

Aldrich, 31 Michigan, when speaking of the relation of a covenant to insure to the mortgage: 'Chapman had bound himself to afford Miller security supplementary to and connected with the the mortgage. The mode agreed on had reference to the mortgage buildings, and was to be of a nature to keep the mortgaged property itself so far intact as a means of security to perpetuate the safety of the mortgagee's interest in case the buildings should burn. This stipulation was in equity a sort of adjunct to the mortgage, and was binding on Chapman and all others in his shoes with notice. Now if by acceptance of the deed the purchaser agreed to indemnify the vendor against the mortgage debt," (or to assume the mortgage debt) "shall he *not much more* be deemed to have assumed every incident which was made a supplemental, additional, covenantal means of ensuring the payment of such mortgage debt."

This becomes the more clear when the provisions of the mortgage are recalled. By those provisions, the possession of the property is made to depend upon the fulfilment of the covenants, stipulations and agreements of the mortgage. These include the covenant to insure. For a default in any one of these covenants, the mortgaged property becomes forfeited to the mortgagee, without regard to whether the property is still in the hands of the mortgagor or sold to a purchaser subject to the mortgage. The right of the defendant to hold the property as against the mortgagee depended upon the fulfilment of the covenant to insure by the mortgagor. Can it be said, with such a provision in the mortgage, that the purchase of the property under circumstances which the purchaser knew must forever prevent the mortgagor from fulfilling that covenant, did not contemplate the inclusion of that covenant in any liability which the purchaser assumed?

The defendants seek to overcome the obvious force of these considerations by pointing to *a part*

of Article Fourth of the mortgage. Did they quote the whole of that article, the fallacy of their argument would be apparent. We here quote the entire article:

"ARTICLE FOURTH.—At any sale of the aforesaid property, or any part thereof, whether made by virtue of the power of sale hereby granted to the said trustees, or any other power of sale heretofore or hereafter granted or given by the said party of the first part, or by or under any judicial proceedings whatsoever, the said trustee, or any committee of bondholders chosen and appointed for that purpose, if requested so to do by the majority in value of the said issue of the bonds then outstanding and unpaid, may bid for and purchase, or cause to be purchased, the property so sold, or any part thereof, on behalf of all the holders of the bonds hereby secured, and then outstanding and unpaid, in the proportion of the respective interests of such bondholders, at a reasonable price, if but a portion of the property be sold, or if it all be sold, at a price not exceeding the whole amount of such prior liens and incumbrances as may then stand charged upon and against said premises, together with the amount of the principal of such bonds then outstanding and unpaid interest thereon, and the costs and expenses of the sale, and of the suit under which such sale shall be made, and in that case the said Trustee, or the said committee of bondholders, as the case may be, after purchasing and acquiring the title to the said property of the party of the first part and premises at and under such sale, shall reconvey the said property and appurtenances and franchises to such new company, and at such time, and upon and under such terms and provisions as may be agreed upon and fixed in writing, by a majority in value of the holders of the principal of the bonds secured hereby, and then outstanding and unpaid.

"It being expressly understood and agreed by and between the parties hereto, and by and between the said parties of the first part, and the respective holders of the said several bonds, collectively, that no other suit or proceeding for the collection of any

part of the principal or interest represented by the said bonds and coupon, shall ever be commenced or prosecuted, either against the party of the first part, or any of its officers, directors or shareholders, either by the said holders of the said bonds or coupons, or any of them, or by any person or corporation to whom the same, or any of them, may be assigned or transferred, except such suits or proceedings as shall be necessary to recover the possession of the said premises hereby conveyed, or to subject the same to the payment of the said debts, and that the sale of the said mortgaged premises, whether under the power of the sale hereby granted, or any other power of sale, or by or under any judicial proceedings whatsoever, shall operate as a full and complete satisfaction and discharge of the indebtedness of the said party of the first part, upon the said bonds and the coupons accompanying the same, and of the obligation of the covenants herein contained, whether the said premises shall be bidden in for the whole amount of the said indebtedness or for a less price, anything in the said bonds and coupons or therein contained, to the contrary thereof notwithstanding."

The meaning of the above clause in the mortgage is plain. It takes away the right of the *bondholders* to bring suits upon the bonds when once the powers of the mortgage for the enforcement of the security have been fully exercised by the Trustee. In other words, when a sale of the mortgaged property shall have taken place, the right of bondholders to sue *on the bonds* shall cease. But until such sale shall take place, the right to collect the face value of the bonds with interest necessarily resides in every bondholder. But even when a sale occurred, Article Fourth would not and could not have the effect attributed to it by the defendants. They argue that by this clause all personal obligation on the mortgage debt was done away with. But it is inconceivable that bonds should be outstanding, which by their terms bind the obligor to pay a debt evidenced by them,

and yet be devoid of any obligatory force. And it is equally inconceivable that there should exist a *security* for a debt, such as a mortgage must necessarily be, and yet there be no debt to secure. By the terms of the mortgage the parties may, if they please, restrict or do away altogether with the *remedies* for breach of the covenants of the bonds and mortgage, or either of them; but it is impossible, in the nature of things, for them to destroy the *obligation* of the bonds so long as the bonds themselves endure or the mortgage continues to be a mortgage.

Now, this reflection is a very important one. For the defendants and the learned judge who wrote the majority opinion in the Circuit Court of Appeals, overlook the distinction between the obligation—that is, the liability on the debt—and the enforcement of that liability. We might concede the impossibility of enforcing such liability (which we do not concede, however), without impairing the liability itself. The situation, in such case would be precisely similar to the situation of a cause of action barred by a statute of limitations. The cause of action would still be intact and entire; its enforcement alone would be frustrated.

The importance of this distinction lies here: that in the present case there is no attempt to *sue upon the bonds*, which is the only remedy prohibited by this restrictive clause. The defendants argue that as there is no personal obligation on the mortgagor's part to pay the mortgage debt there can be no implied covenant on the part of the purchaser of the equity either to pay the mortgage debt, or to indemnify the mortgagor. The error of this argument is made manifest, we think, by the above distinction, and lies in the assumption that because one of the remedies of the obligee may be restricted, or destroyed, the personal obligation on the bonds has terminated. There *is* such a personal

obligation still resting on the mortgagor, and henee there is no difficulty about the inference of a covenant.

But our adversaries may say : Of what value is this obligation, if it cannot be enforced ? To this we answer that we are not seeking to exercise that remedy which. allowing the utmost to the other side this provision prohibits. No bondholders are here seeking to enforce the personal liability on the bonds, nor indeed is the trustee—to whom, by the way, the clause in question does not extend—seeking to do anything of that character. But what we are trying to do is to enforce, on behalf of the trustee, and in a Court of equity, *the covenant as to insurance*, which is not in any sense the covenant to pay the mortgage debt. That covenant flows out of the necessity to protect the security of the mortgage. The obligation to pay the bonds might exist without the mortgage, the covenant to insure never could. While closely connected, the two obligations are nevertheless several and distinct, growing out of the same *debt*, to be sure (a debt which, as we have shown, still exists in spite of the Fourth Article), but requiring different *remedies* for enforcement, and the covenant to insure concerning much more directly the value of the security which continues to be impressed with the lien of the debt in whosesoever hands it comes. Hence Article Fourth has no application whatever to proceedings, either direct or indirect, upon the covenant to insure, and cannot affect the duty of the Court to imply a covenant to insure on the part of the purchaser, or at least a covenant to indemnify the mortgagor against all liability upon the covenant to insure. It would seem clear that the obligation upon the implied indemnity can be enforced in this suit. The proposition which governs was so well stated by our opponents in their brief in the lower court that we quote it here :

"The purchaser of land subject to a mortgage who assumes and agrees to pay the mortgage debt, becomes as between himself and his vendor the principal debtor, and the liability of the vendor as between the parties to the deed of assignment is that of surety. If the vendor pays the mortgage debt he may sue the vendee at law for the money so paid. In equity, a creditor may have the benefit of all collateral obligations for the payment of the debt which a person standing in the situation of a surety for others holds for his indemnity; and upon the application of this principle, the mortgagee may enforce against the grantee of the mortgagor a personal obligation which the grantee has entered into with the mortgagor to pay the debt.

133 U. S., 624-625.
Fuller vs. *Hughes*, 12 N. Y., 79."

It is no answer to this point to say that there has been no breach of the covenant of indemnity. We have already pointed out that the defendant necessarily knew when it bought this property that by that very purchase it was certainly depriving the mortgagor company for all time of the power to carry out the covenants of the mortgage or to pay the mortgage debt. To have sued the mortgagor company upon the covenant to insure would have been the most idle farce. What property has the defendant left to the Pennsylvania Plate Glass Company with which that company could meet a judgment obtained in such a suit? To require such a suit as a preliminary to the present proceeding would be a travesty on justice. The result is as certain to-day as if the action had been brought and ended; and the procedure by which the mortgagor and the appellant have been joined together in this one suit is manifestly the right one.

The balance of the argument is forcibly stated by Judge BUFFINGTON, in the Circuit Court opinion, and we quote it below:

"The proofs show that request to insure was

duly made by the trustee upon the mortgagor and upon the subsequent purchasers, which request was not complied with. It would therefore seem that by such failure to insure there was a default and a direct liability of the mortgagor to the trustee upon the covenant to insure, and there was a default and a liability of the subsequent purchasers to the mortgagor upon their agreements to indemnify. Such requests were made in writing more than six months prior to the filing of the bill. Default having continued more than six months it became such a breach as warranted the trustee in either taking possession, selling at non-judicial sale or maintaining foreclosure proceedings.

"After the bill was filed, a demand upon these parties to insure was also made at bar by counsel for the trustee at the time of the application for a Receiver to take possession of the mortgaged premises as we have noted above.

"Under the facts it would seem that a Court of equity having jurisdiction of the subject matter and of all parties, had power to, and to avoid circuity of action, would direct the purchaser to insure for the benefit of the trustee.

"This Court had jurisdiction of the mortgage and therefore of the mortgagor and mortgagee. Kann and The Penn Plate Glass Company, who had bought subject to it, were also parties. The question of insurance, with the determination of the several rights or obligations of all parties in reference thereto were kindred and germane to the foreclosure, and therefore to the principal subject of jurisdiction. The principle is clear that where equity jurisdiction has once rightfully attached to a controversy it will be made effective for the purpose of complete relief and to dispose of all incidental and germane questions. Fetter on Equity, page 13; Winton's Appeal, Pa. St., 97, P. 395; Allison's Appeal, 77 Pa. St., 227; McGowan *vs.* Remington, 2 Jones, 63; Souder's Appeal, 57 Pa. St., 498; Soucher's Appeal, 104 Pa. St., 615. The trustee having exercised its right of requiring insurance, the mortgagor being insolvent, the purchaser being in possession and enjoyment of the premises, and all parties before the Court, it would seem clear to us that a Court of equity, by its very nature constituted with plastic

power to secure direct results, and in pursuance of its principle of avoiding circuity of action, had the right to order and decree that the purchaser should place insurance upon the property for the benefit of the trustee. A Court of equity having original jurisdiction to compel specific performance of a contract to indemnify. Chamberlain *vs.* Brown, 6 Blackf., 490; Champion *vs.* Brown, 6 John. Ch. Rep., 398, Fry on Specific Performance (3 American Edition), p 704—its jurisdiction and power to do so in this case where the covenant to insure was incidental to the mortgage, the original subject of jurisdiction, and where moreover the breach of such covenant to insure was one of the grounds warranting the foreclosure, would seem clear. That the Court did not see fit in an interlocutory state of the case to make such order, that in such preliminary stage it did not enter into an immediate, definite ascertainment of its right or duty to do so, cannot affect the relative right of the parties. Mere lapse of time will not prevent a Court of equity from affording relief where there was a right to relief when the bill was filed. Wilkinson *vs.* Torkington, 2 Younge & Collyers Reports, 729.

"Pending the appointment of a receiver, the purchasers agreed to and did place insurance, and the improved property has been wholly destroyed. If the insurance goes to the bondholders it represents an avoidance of loss for that which it held as security for money paid to the mortgagor. If the purchaser holds it, it speculatively gains by the destruction of that for which it had never paid, to wit: the $250,000, representing deferred purchase money.

"Now, on final hearing of this case, it being clear that the purchaser was liable at any time during its pendency to the entry of an order directing that insurance be entered for the benefit of the trustee, and the purchaser having in effect placed insurance subject to the determination of the Court as to its liability to do so, why should not the Court on final hearing enter the decree which it could have made in an earlier stage of the case? This insurance was placed by a party to this litigation under stress of an application for the appointment of a receiver and a consequent ex-

clusion from possession. It is now clear that such litigant should have placed the insurance for the benefit of the trustee and was bound to do so if thereto required by the Court. When now on final hearing the proceeds of that insurance is before the Court, when the position of the parties has not been changed, why should not this Court on final decree stamp with an equitable lien the proceeds of a fund which it might have created by an earlier order?

"The position of the parties has not changed. *To say that the trustee had an insurable interest and could itself have insured, does not affect the case. While it could do so, it could also require the mortgagor to perform this duty. The purchasers with full knowledge of that duty on the part of the mortgagee, took the property and undertook to indemnify the vendor against this covenant.* This they have not done. They paid some $83,000 for the property. They insured it for more than three hundred thousand dollars and now on the destruction of the property, which was the substantial security for $250,000 owing the trustee, they seek to avoid payment of the $250,000 and to realize on the $83,000 paid by them the sum of upwards of $300,000 in insurance upon property for which they have never paid.

"The allowance of such a result under the facts and circumstances would be highly inequitable, for it is a principle of equity that in a contest between one who is seeking to make a gain and one who is struggling to avoid a loss, equity will lean toward him who has actually lost, rather than to him who merely seeks to gain. Miller *vs.* Aldrich, 31 Mich., 416."

Fifth.

In view of the large amount involved, of the elaborateness of the opinion filed in the Court of Appeals, and of the complicated questions to be considered, it may not be amiss, at the expense of reiteration, to restate some of the propositions

upon which this appeal is rested, and, under each proposition, to say something additional.

We claim :

I.—In the mortgage the mortgagor agreed with the trustee to insure the buildings when required so to do by the latter.

II.—The conveyance to the Penn Plate Glass Company imposed upon it, in favor of the original mortgagor, the mortgagor's duty to insure the buildings when required by the trustee, in order that the mortgagor might be indemnified against a nonperformance of its covenant.

III.—The fund raised by the insurance, qua the mortgagor, is impressed with the duty of indemnifying it against its covenant to insure when required by the trustee.

IV.—The fund raised by the insurance, thus impressed with the duty of indemnity of the mortgagor, is collateral security for the performance by mortgagor of its duty to insure and, as such, enures to the benefit of the trustee.

V.—The obligation entered into by Kann and Wertheimer, whilst they were acting for the benefit of the Penn Plate Glass Company, of which

benefit the latter took advantage, imposed upon the latter the duty to apply the insurance money in payment of the mortgage bonds.

VI.—The retention of possession by the Penn Plate Glass Company, after default and after application for a Receiver, gave to the Trustee an interest in the insurance money.

Before discussing these propositions in detail, it may be well to bring into one point of view certain stipulations of the mortgage. It recites an intent "to limit the remedy of the holder" (of the bonds secured) "in case of default in the payment of principal or interest to the subjection of the property and premises to be conveyed to the payment thereof."

The conveyance to the Trustee is of:

"Also all and singular all the other property, real and personal or mixed, of every description whatsoever, belonging to or which may hereafter be acquired by said party of the first part, situate on or appurtenant to above-described premises. Together with * * * all the estate, right, title, interest, property claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the said premises and every part thereof, with the appurtenances."

The conveyance in mortgage to the Trustee is expressed to be in trust for the security of the bondholders, "and for the uses and purposes, and upon and under the terms and stipulations hereinafter expressed and contained."

Amongst the terms and stipulations, are those contained in the Tenth Article, to which special allusion will subsequently be made.

By Article Second it is *inter alia* provided that it shall be lawful for the Trustee

"To enter into or upon all and singular the premises hereby conveyed, or intended so to be, and each and every part thereof, and wholly to evade the said party of the first part, its agents and servants therefrom, and to have, hold and use the same, operating by its managers, superintendents, receivers, servants or other attorneys or agents, the said plate glass company and appurtenances, conducting the business thereof, and enjoying the franchises pertaining thereto, making from time to time all such repairs and replacements, and such useful alterations, additions and improvements as may seem to be necessary and judicious to carry on the business of said party of the first part and to collect and receive all incomes, rents, issues and profits of the same and every part thereof, and after deducting all the expenses of operating and of conducting the business thereof, and of all the said repairs, replacements, alterations, additions and improvements, and all payments which may be made for taxes, assessments, charges or liens, prior to the lien of these presents, upon the said premises or any part thereof."

By Article Third it is provided that there shall be deducted from the proceeds of sale of the mortgaged premises by the Trustees:

"All other expenses, advances or liabilities which have been made or incurred by the said Trustee, in operating or maintaining the said plate glass works, or in managing the business while in possession, and all payments which shall have been made by it for taxes or assessments, or for charges or liens prior to the liens of these presents upon the said premises or any part thereof."

By Article Fourth it is provided:

"It being expressly understood and agreed by and between the parties hereto, and by and between the said party of the first part and the re-

spective holders of the said several bonds, collectively, that no other suit or proceeding for the collection of any part of the principal or interest represented by the said bonds and coupons shall ever be commenced or prosecuted, either against the party of the first part or any of its officers, directors or shareholders, either by the said holders of the said bonds or coupons or any of them, or by any person or corporation to whom the same or any of them may be assigned or transferred, except such suits or proceedings as shall be necessary to recover the possession of the said premises hereby conveyed, or to subject the same to the payment of the said debts, and that the sale of the said mortgaged premises, whether under the power of sale hereby granted or any other power of sale, or by or under any judicial proceedings whatsoever, shall operate as a full and complete satisfaction and discharge of the indebtedness of the said party of the first part, upon the said bonds and the coupons accompanying the same, and of the obligation of the covenants herein contained, whether the said premises shall be bidden in for the whole amount of the said indebtedness or for a less price, anything in the said bonds and coupons or therein contained to the contrary thereof notwithstanding."

By Article Sixth it is provided:

"The said party of the first part shall, from time to time, and at all times hereafter, and as often as thereunto requested by the trustee or its successors, execute, acknowledge and deliver all such further deeds and assurances in the law, for the better assuring such the said trustees and its successor or successors in the trust hereby created, upon the trusts herein expressed, the premises, franchises and appurtenances hereinbefore mentioned and conveyed, or intended so to be, and all other property and thing whatsoever appurtenant thereto, whether now acquired and held or hereafter to be acquired, as by such trustee, its successor or successors, or their counsel learned in the law, shall be reasonably advised, *are required.*"

By Article Tenth it is provided:

"The right of action under this Indenture is vested exclusively in the trustee, and under no circumstances shall any bondholder or bondholders have any right to institute an action or other proceeding on or under this Indenture for the purpose of enforcing any remedy herein and hereby provided, or of foreclosing this mortgage, except in case of refusal on the part of the trustee to perform any duty imposed on it by this agreement; and all actions and proceedings for the purpose of enforcing the provisions of this Indenture shall be instituted and conducted by the trustee, according to its sound discretion."

By the same Article it is further provided:

"It shall be no part of the duty of the party of the second part to file or record this indenture as a mortgage or conveyance of real estate, or as a chattel mortgage, or to renew such mortgage, or to procure any further, other or additional instrument of further assurance, or to do any other act which may be suitable and proper to be done for the continuance of the lien hereof, or for giving notice of the existence of such lien, or for extending or supplementing the same; nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance, or to keep itself informed or advised as to the payment of any taxes or assessments, or to *require* such payment to be made; but the trustee may, in its discretion, do any or all of the matters and things in this paragraph set forth, *or require the same to be done.*"

I.—In the mortgage, the mortgagor agreed with the Trustee to insure the buildings when required so to do by the latter.

The learned Circuit Court of Appeals, in the opinion filed on behalf of the majority by Judge Gray, reached the conclusion that there was no duty on the part of the mortgagor to insure.

As is very forcibly shown by the dissenting

opinion of Judge Acheson, it is inconceivable that the parties would have entered into the mortgage arrangement without imposing upon the mortgagor a duty to insure the premises wholly insufficient as security unless improved. The mortgage did not mature for ten years. No funds were placed in the hands of the Trustee covering insurance. Nothing was to be paid to the bondholders saving the interest upon their bonds. A destruction of the improvements on the mortgaged premises at any time during the ten years would practically destroy the security for the bonds.

As is shown by the Tenth Article above recited, it was made no part of the duty of the Trustee "to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance * * * but the Trustee may, in its discretion, do any or all of the matters and things in this paragraph set forth, or *require the same to be done.*"

There can be no question that whilst the Trustee is not bound, as part of its duty to the bondholders, its *cestuis que trustent*, "to effect insurance against fire, etc.," yet that in its discretion in may effect such insurance. Its discretion extends not only to the effecting the insuranee itself, but also to "requiring" the same to be done.

The Century Dictionary defines "*require*" thus:

"To ask or claim as of right, by authority; demand; insist on having; exact."

A power is given to the Trustee, corcerning the specific subject matter of insurance, to require somebody to effect the same. This power necessarily comprehends a duty on the party upon whom the requisition can be made to comply therewith.

It clearly was not the intent of the stipulation

that the bondholders should effect the insurance. No funds applicable to the purpose were in their hands.

The mortgage, as we have seen, is made under "the terms and stipulations hereinafter expressed and contained." Amongst these terms and stipulations is the one we have recited concerning insurance.

Nothing is more reasonable than to suppose the parties would stipulate for insurance. We submit that such stipulation is expressed with clearness, and sufficiently, by the clause we have recited, authorizing the Trustee to require, *inter alia*, the effecting of insurance if, in their discretion, they shall determine not themselves to effect the same.

The contemporaneous construction of the instrument by both the parties thereto in the taking out of insurance for the benefit of the Trustee and in the renewing the same, is very significant, far overbalancing any weight to be attached to the fact, upon which Judge Gray dwells so strongly, that the requirement is embodied in but few words, at the end of a clause limiting the personal responsibility of the Trustee in case of its not doing certain enumerated things.

In the Court below, a suggestion was faintly made, which was apparently rejected by the Court of Appeals, to the effect that there was nothing said, expressly, about insuring for the benefit of the Trustee. What was to be done under requirement, in the way of insurance, was put as an alternative to what might be done by the Trustee itself in its discretion. Of course, the Trustee, if it should insure, would do so in its own name for the benefit of the *cestuis que trustent*. It had a right to require to be done by the mortgagor what it could have done itself, viz.: insure for their benefit.

In considering the probability of an intention by

the parties to impose a duty upon the mortgagor to insure upon demand, we must bear in mind the fact that payment of principal and interest of the bonds could only be obtained out of the mortgaged premises. Any covenant to insure must necessarily have covered an insurance for the benefit of the bondholders.

Amongst other things the trustee had a right to require the renewal of policies of insurance. The original policies were taken out for its benefit. The right to "renew" was, of course, a right to demand that renewal policies should be continued upon the original basis, in the name of the original payee.

The learned Court of Appeals held that there was no duty even upon the original mortgagor, to comply with a requirement by the trustee to effect insurance, and, in thus holding, sought to destroy nearly every basis upon which the complainant rests. Whilst all other propositions were also decided against the complainant, there was fixed in the minds of the majority of the Court, an idea that there was no solid foundation for the complainant's contention. This probably affected its judgment upon the remaining propositions.

Let us examine the grounds upon which Judge Gray, in his elaborate, and very able, opinion, rested his denial of the duty of the mortgagor to insure. He says:

"It requires attentive reading to discover the language in these paragraphs which would give color to the contention of complainant below as to the existence of a covenant therein on the part of the mortgagor, to insure for the benefit of the mortgagee and bondholders. It is upon the words 'or require the same to be done' in the last paragraph quoted the complainant below relies."

Conciseness of expression ought not to operate

to defeat a right if the same be expressed. Prolixity is not a virtue, nor should it meet with the favor of the Courts. A most vital provision, omitted in the first drafting of an agreement, might be inserted in a few words of interlineation, without any impairment of its obligation.

Judge Gray calls attention to the fact that the provision concerning insurance, is imbedded in the Tenth Article of the mortgage, amongst paragraphs "obviously concerned with limitations on the responsibilities and obligations of the mortgagee and trustee, to the bondholders," whilst "other articles in the mortgage are concerned with prescribing as between the mortgagor and mortgagee the terms or conditions upon which default or forfeiture of the mortgage may be declared by the mortgagee," etc., etc. He then adds:

"But in the paragraphs quoted after the operative and conveying and defaulting clauses in the mortgage, which have to do with the relations of mortgagor and mortgagee, we have here in the Tenth Article, what naturally belongs to such an instrument, viz.: A declaration and qualification of the trusts assumed in said mortgage by the mortgagee, as trustee, to the bondholders. The language implied is not contractual as between mortgagor and mortgagee, but declaratory of the trusts assumed, and is addressed by the trustee to his *cestui que trust*. The mortgagor could have no interest in the duties or responsibilities assumed by the trustee to the *cestui que trust* and the limitations and qualifications put upon those duties and responsibilities so assumed could not affect in any degree the liability of the mortgagor."

The Tenth Article, at least in its earlier portion, is directly concerned with a matter in which the mortgagor is interested, viz., in the forbidding the bondholders to institute actions or other proceeding under the mortgage, and in the requiring that the latter shall be enforced by the Trustee.

The concluding part of the Tenth Article is one in which the mortgagor, as well as the *cestuis que trustent*, is interested :

"It shall only be responsible for reasonable diligence in the performance of the trust, and shall not be answerable in any case for the act of any agent, attorney or employee selected with reasonable discretion ; it shall be entitled to be reimbursed for all proper outlays of every sort or nature by it incurred in the discharge of its trust, and to receive a reasonable and proper compensation for any services that it may at any time perform in the discharge of the same ; and all such fees, commissions, compensation and disbursements so constituting a lien on the mortgaged property and premises."

If, in the exercise of its discretion, the Trustee should see fit to advance the moneys requisite to secure or renew insurance, it was given the right to treat its disbursements in that respect, as a lien on the mortgaged premises. How then can it be said that the mortgagor is not interested in the particular portion of the Tenth Article to which the learned Judge refers? A duty to reimburse advances for insurance, made by the Trustee, is imposed as a contractual duty by the portion of the Article the learned Judge dwells upon as dealing only with the regulation of the relations between the Trustee and its *cestuis que trustent*.

We submit, with great respect, that the interpretation put upon the Tenth Article by the learned Judge, whilst able, is too finely drawn and narrow. It utterly fails to point to any person upon whom the requirement can be made.

A right to require the effecting or renewing of insurance can hardly be said to be one confined to the fiduciary relation between Trustee and its *cestuis que trustent*. It directly concerns the relation of mortgagor and mortgagee.

The learned Judge further says, speaking of the requirement:

"It occurs at the close of an enumeration of a number of things, which the Trustee declares it shall not be under obligation to its *cestuis que trustent* to do. So that it is not the case of the Trustee speaking specifically about its exemption from obligation to insure, and saying as to that it may, in its discretion, insure or require the same to be done, but it is a case where the Trustee, having exempted itself from liability in a number of matters, reserves to itself, in a general phrase, the right, if it sees fit, to do any of the enumerated things."

The vice of what is thus said lies in the fact that the learned Judge does not add to the words, "to do any of the enumerated things," the additional words, "or require the same to be done."

There is some force in the observation that if a Trustee stipulates it shall not be its duty to do certain things beneficial to the *cestuis que trustent*, it thereby deals only with its relations with the latter. Its force is broken, however, by the fact that the stipulation does not appear in a declaration of trust, but in an instrument between mortgagor and mortgagee, defining the terms and conditions of the mortgage.

Its force is wholly lost, when we consider that the Trustee, if it had been dealing solely with its relations to its *cestuis que trustent*, would have stopped with the statement of the things it was not to be compelled to do. After this stipulation, however, it adds that it may, in its discretion, do certain things, or that it may require them to be done. The mortgagor executed an instrument in which it provided that the Trustee might require a thing to be done which, necessarily, could be required from it alone. We submit that the question as to the person upon whom the requisition

may be made, and as to the right to make the same, is not affected by the fact that there are a number of things concerning which may be required, especially where it is provided, concerning such right to require, that it is applicable to "any or all" of such antecedent matters.

The learned Judge adds:

"In applying this phrase to the preceding enumeration of things, as to which the trustee claims exemption, we find there are certain acts which refer to an individual performance on its part; as, for example, it is not obliged to 'file of record the mortgage,' 'or renew such mortgage,' or 'procure further assurance,' or 'do any act suitable for the continuance of the lien,' or 'give notice of the existence of the lien,' or 'effect insurance against fire,' or 'renew policies of insurance.' These are all things to be done or not to be done by itself. Then we have the following: It is not obliged 'to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made.' Here is a matter as to which there is a distinction made between the direct personal act of the Trustee itself and what it may require another to do, and the language immediately following would seem to have been framed with direct reference to that distinction, so that when the Trustee says 'it may in its discretion do any or all of the matters or things in this paragraph set forth, or require the same to be done,' it was to make it applicable among other things to the language just referred to in regard to the payment of taxes. The alternative phrase, or 'to require the same to be done,' makes the whole reservation of authority to the Trustee cover more completely (verbally at least) the preceding enumeration of acts and things as to which it had exempted itself from liability."

As the learned Judge says, there are certain acts of individual performance which the Trustee is not compelled to do; but in its discretion may do, or in its discretion may require to be done. Its discre-

tion may be exercised in the doing, or requiring to be done, of any or all of the matters which by the clause may by it be done.

Concerning the payments of taxes and assessments, the Trustee wished to exempt itself from liability to keep itself informed or advised as to whether they were or were not paid, and also from all liability to require such payment. What it exempted itself from, however, was any liability for its personal act, in not informing, or advising itself, as to such payment, or in not requiring such payment. The provision which followed therefore, viz., that it might, in its discretion, "do any or all of the matters or things in this paragraph set forth, or require the same to be done," was applicable to its discretion to keep, or not to keep, itself informed or advised of the payment, or to require, or not to require, payment of taxes and assessments. It was not obliged to keep itself informed or advised as to the payment; but, in its discretion, it might do so. It was not compelled to require payment of the same to be made; but in its discretion it might require. In its discretion it might require the mortgagor to inform, or to advise, it, as to the matter of such payment. The mere fact that it had a discretion to require the payment of the taxes does not diminish the force of the subsequent phraseology authorizing it generally concerning "any or all of the matters or things in this paragraph set forth, to require the same to be done."

The learned Judge also dwells upon the fact, that Article VI of the mortgage specially provides for giving "further assurance" and that in the Tenth Article the trustee is not obliged to procure "any further other or additional instrument of further assurance," though in its discretion it may procure the same, or require the same to be given and finds, in this fact, something which militates

against the holding the mortgagor subject to a requirement to do the things specified in said Tenth Article.

We submit that there can be no conclusion that the trustee was not authorized to require the mortgagor to give further assurance, from the fact that there was a special clause covering such further assurance. With regard to the same, as to other things particularized, it was desired to put clearly the fact of the right of the trustee, though not compelled so to do, to require a doing.

II.—The conveyance to the Penn Plate Glass Company imposed upon it in favor of the original mortgagor, the mortgagor's duty to insure the buildings when required by the trustee, in order that the mortgagor might be indemnified against a non-performance of its covenant.

Under this head, we will not repeat the argument already made *in extenso* in our brief, in its earlier portions. As between a mortgagor and its grantee, taking a conveyance subjected to a mortgage, there can be no doubt as to the duty of the grantee to exempt the mortgagor from any liability growing out of such mortgage. By such conveyance, the mortgagor charges upon its grantee, the duty theretofore encumbent upon it, by virtue of such mortgage. Indemnity against the same is the right of the mortgagor for which it gives consideration upon settlement for the purchase money, in the shape of an allowance of its amount.

It well may be, that a mortgagee has no direct right to claim the benefit of a contract between the mortgagor and its grantee, for which it gives no consideration; but there ought to be no doubt as to the meaning of a conveyance of premises thus subjected to a mortgage, or as to the right of

the mortgagor as a contracting party, to enforce the implied agreement, meant to be entered into.

The purpose of the Act of 12th June, 1878 (P. L., 205), was not to deal with the liability imposed upon a grantee, by the conveyance to him of premises subject to a mortgage, which he assumed as part of the purchase money. It dealt with the personal liability theretofore held to exist, on the part of the grantee, in favor of the mortgagee, to pay the mortgage; not with the duty to the mortgagor to indemnify it in case of its being compelled to pay what it had furnished the grantee with funds with which to liquidate.

Necessarily, the statute dealt only with the right of the holder of the ground rent, mortgage, or other encumbrance, because the provision was that the grantee should "not be personally liable for the payment." Any other interpretation of the act would work a gross fraud, by permitting a person buying property for, say, $10,000 subject to a mortgage of $5,000 assumed by him, to refuse such payment not only to the mortgagee—but in case of an exaction from the mortgagor of payment of the residue in case of a deficiency upon foreclosure, to refuse to reimburse the latter.

In a long line of antecedent cases, it had been held that the conveyance of property subject to a mortgage, gave a right to the mortgagee, as against the grantee, to demand payment directly. These decisions were meant to be neutralized by the statute. In the case of *Blood* vs. *Crew*, 171 Penna., 339, where the question which was involved was the vendor's right to enforce the implied covenant of indemnity against the vendee, the Court held:

"The Act of 1878 plays no part in this case. The action is not brought by the holder of the mortgage to assert a personal liability against the vendor, and for that reason the Act does not apply."

The appellee, however, contends that there is nothing against which the mortgagor can be indemnified, because of the provisions in the mortgage which exempts the mortgagor from all personal liability for payment of the principal or interest thereof.

Let us concede that the mortgage does exempt the mortgagor, and all persons interested therein, from any suit or proceeding "for the collection of any part of the principal or interest represented by the said bonds and coupons," and that the sale of the mortgaged premises, under foreclosure, is agreed to operate as a full and complete satisfaction and discharge of the indebtedness of the mortgagor upon the said bonds and the coupons accompanying the same, whether the premises be bidden in for the whole amount of the indebtedness, or for a less price.

The argument of the appellee in this particular loses sight of the fact that there are covenants by the mortgagor, including the one to effect insurance when required by the trustee, which are not included within the stipulation for exemption from liability in case of failure of the proceeds of the mortgaged premises fully to liquidate the bonds and coupons. The provision of exemption is meant only to cover the case of liability for the amount of the indebtedness secured by the mortgage and does not exempt the mortgagor from its duty to perform its collateral covenants.

The bondholders were willing to rely upon reimbursement out of the proceeds of sale of the mortgaged premises because the trustee took collateral covenants. They knew that if the premises should be burnt and if there should be adequate insurance thereof, the security would be sufficient. Relying upon performance of the collateral covenants, they were willing that a stipulation, limiting reimbursement to the mortgaged premises, should be in-

serted. Because of this reliance upon the value of the latter, unimpaired by failure to perform what was collaterally agreed upon, it was insisted that the mortgager should agree to insure. In case of its failure to insure, and of loss resulting therefrom, it would be responsible, despite the provision exempting it from liability for payment of the bonds and coupons. In subjecting its grantee to the mortgage, it charged upon the latter the duty of indemnifying it against any loss which might result from breach of the insurance covenant.

It was suggested in the Court below that the agreement of exemption covered more than an exemption from liability to pay the indebtedness. In support of the suggestion reference was made to these words:

"The sale of said mortgaged premises * * * shall operate as a full and complete satisfaction and discharge of the indebtedness of the said party of the first part upon the said bonds and coupons accompanying the same, and of the obligation and covenants herein contained, whether the said premises shall be bidden in for the whole amount, etc., etc."

If the words "of the obligation and covenants herein contained" were meant, which we deny, to include such covenants as that to insure, they were certainly not meant to exempt from liability for a past breach, but simply from any future obligation of the covenant, unbroken at the time of foreclosure sale.

It is not necessary, however, to discuss the question of whether or not it was meant to exempt from liability for a breach of covenants, before the happening of the event, a sale, which was to discharge the obligation of the same, in view of the fact that at the time of the fire there had been no sale of the premises under judicial

proceedings or otherwise. The fire occurred on the 12th April, 1898. The foreclosure took place under a decree entered on the 25th day of July, 1899. If, therefore, the mortgagor covenanted to insure, when demanded by the trustee, the right of the trustee to insist that there should be a payment to it of the purchase money, or that it should be compensated for the breach, had matured, at the time when the covenant, however it is to be construed, was in operation. At that time, the mortgagor was entitled to demand performance by the grantee, of its duty to indemnify it, and if there was a fund which, because of the duty, was liable to be appropriated, the rights therein of the respective parties were at that time vested. No subsequent sale under foreclosure could divest the same.

Concerning the contention we have been making under this head Judge GRAY says:

"So far, then, we must conclude that, the implied contract arising from the words, 'subject to the mortgage,' is simply and solely a contract between the grantor and grantee of the equity of redemption, and can have no greater or other effect, at the most, than an express contract on the part of the grantee with the grantor, to pay the mortgage debt, and that this contract must be measured by its own terms; that such an express contract to pay the mortgage debt draws with it no obligation to perform any of the covenants of the mortgage, except those which run with the land, and those would be binding on the purchases, irrespective of any contract to pay the debt. As it is conceded that the alleged contract to insure in this case does not run with the land, an obligation to pay the mortgage debt on the part of the grantee of the equity of redemption, if any such exist,' of itself imposes no obligation to insure. This being so, it would seem to deprive of all force the argument of complainant last adverted to, viz.: that, inasmuch as the mortgage provides that in case of default in the performance of any of the covenants of said

mortgage, the same shall, at the election of the mortgagee, become due and payable, and that foreclosure proceedings having been instituted (whether distinctly for this special default, or not), there was a right in the complainant trustee to enforce, by entry and holding possession, the lien of the mortgage for such a breach of this covenant, and that such lien is hereby impressed on this insurance fund, payable by the terms of the policies to the appellant company in its own right. But, if it be true, as we have stated it to be above, that the implied contract of the appellant, as grantee of the equity of redemption, with the mortgagor and grantor, to pay the mortgage debt (if such implied contract existed), does not draw with it an obligation to perform the covenants of the mortgage, the *nexus* between such default and the funds resulting from insurance, taken out by appellant company, in its own right and for its own benefit, fails to be established."

He further says:

"First, was there an obligation resting on the appellant company to indemnify the mortgagor for his liability under the alleged contract to insure, by reason of the conveyance to it of the mortgaged premises, expressly subject to the mortgage; * * *

"As we understand complainant in its brief and argument to practically admit that this is so, further discussion on this point is unnecessary. The reasoning that would exclude the implication of a direct obligation on the part of the defendant company to insure for the benefit of the mortgagee, by reason of its having become the grantee of the equity of redemption, subject to the mortgage, would seem also to exclude the implication of an obligation to indemnify the mortgagor on his convenant to insure. The taking expressly 'subject to a mortgage for $250,000,' may well be equivalent, as we have before stated, to an express contract to be responsible to the mortgagor for the mortgage debt, as part of the purchase-money, but there is no implication in such a taking, that the grantee is to be liable on the personal covenant of the mortgagor to insure. It is not

within the terms of the contract, and it would be doing violence to the situation to impose such a liability, without some evidence of assent on the part of such grantee. The only way in which the grantee of the equity of redemption becomes liable to the mortgagor and vendor, even to pay the mortgage debt, is by virtue of the contract, expressed in the direct assumption of the mortgage as part of the purchase-money, and, in the absence of such an assumption, it would be creating a contract for such grantee, to hold him responsible for any covenants or obligations which the mortgagor has seen fit to enter into with the mortgagee.

"We are here dealing with contract, not with status, and no claim can be enforced against the appellant company, either directly or indirectly, by the impressment of lien on its money or property, unless such claim rests upon an actual contractual relation, or upon such conduct of appellant as amounts to fraud, and estops it from denying such claim."

The learned Judge further says:

"There is still another ground upon which exemption from the liability to insure for the benefit of the mortgagee could be claimed by the defendants in this case; that is, that under the fourth article of the mortgage, the mortgagor is exempted from all personal liability for the mortgage debt, and as, under the Pennsylvania law, as declared by its supreme court, the liability of a purchaser of mortgaged premises, under and subject to the mortgage, was one of indemnity to his grantor in respect to such mortgage debt, it follows that such liability could exist in the present case. As the liability to indemnify the mortgagor on his covenant to insure is incidental and subordinate to his liability for the mortgage debt, no such liability to indemnify rests upon the appellant company and grantee in this case. This view would, of course, destroy the basis for any derivative claim on the part of this complainant, with respect to such liability."

Concerning what is said in the last of the above

quotations, we do not care to add anything to the argument we have already made upon the subject. The exemption from personal liability for the mortgage debt, did not cover the covenant by the mortgagor to insure. It was impossible to bring any suit for the indebtedness itself, either before or after sale under foreclosure, in view of the positive prohibition of any suit or proceeding for the collection of any part thereof, excepting to such extent as should be necessary to recover possession of the mortgaged premises. There was no prohibition of action by the Trustee, founded upon breach of the covenants to care for, and to insure, the premises. Will it be pretended that if the mortgagor had injured the premises by negligence it would not have been liable to suit at the instance of the Trustee, upon its covenant, although it might not have been liable to a suit to recover the debt? The mortgagee agreed to limit its rights to a foreclosure of the mortgage, upon the condition that the covenants concerning the premises mortgaged should be performed.

The learned Judge asserts, in the clearest way, the opinion of the majority of the Court, that although the grantee might have been obliged to indemnify the mortgagor against any liability by the latter for the payment of the bonds, yet that it was not obliged to indemnify against the non-performance of the mortgagor's covenants. This opinion, we submit, is radically wrong. If the mortgagor was liable upon its covenant to insure, it certainly charged upon its grantee, when it conveyed the premises to it for a consideration diminished by the amount of the mortgage, with an agreement by the grantee to take subjected thereto, the duty to indemnify it against non-performance of such covenant. Had the grantee paid the mortgage debt, as was its duty, the mortgagor would have been relieved from all liability because

of non-performed covenants which merely secured collaterally such payment. It was not possible for the grantee to neglect payment of the debt it had assumed and by reason thereof to throw upon the mortgagor liability for breach of covenants such as those to insure.

The assumption of the mortgage necessarily carried with it the duty to do everything requisite to relieve the mortgagor from any liability by reason thereof. We do not find in the opinion we are criticising any attempt, by reasoning, to support the assumption of a liability by the grantee less extensive than that imposed by the mortgage, which as between mortgagor and grantee the latter undertook for an adequate consideration to pay.

It was not necessary for the complainant to contend that a covenant to insure ran with the land. It did contend, however, that such covenant was part of the obligations embodied in the mortgage against which the grantee undertook to indemnify. It was the mortgage which was assumed, and the covenant to insure was a part thereof. The grantee not only failed to pay the mortgage debt, but also neglected to perform collateral covenants, with the result of liability thereby imposed upon the mortgagor, although it had undertaken to relieve it therefrom.

Let us concede for the sake of the argument that the mortgagor could not be compelled to pay the mortgage debt and that because it could not be thus compelled there could be no collection of the same, yet there remains the fact that, as between the mortgagor and the grantee, the latter had assumed such payment, and upon such assumption the mortgagor had insisted, probably because it could be held liable upon its covenants in the mortgage. The result of the failure by the grantee to perform its obligation to the mortgagor to pay was to throw upon the latter a liability for a breach of covenant

against which it had a right to demand to be indemnified.

III.—The fund raised by the insurance, qua the mortgagor, is impressed with the duty of indemnifying it against its covenant to insure when required by the trustee.

We have heretofore endeavored to show (1) that the duty which the mortgagor owed to the trustee was to insure upon demand, and (2) that the duty which the grantee owed to the mortgagor was to indemnify it against a failure thus to insure.

The learned Judge concedes that if the mortgagor had remained the owner of the premises and had effected the insurance which was in existence at the time of the fire the insurance money would have been a fund impressed with the lien of the mortgage debt.

It was impossible not to concede this proposition, in view of the decision of this Court in *Wheeler* vs. *Insurance Company*, 101 U. S., 439, to this effect:

"It is settled by many decisions in this country that if the mortgagor is bound by covenant or otherwise to insure the mortgaged premises for the better security of the mortgage the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor to the extent of the mortgagee's interest in the property destroyed."

Judge GRAY himself puts the proposition with force and conviction when he says:

"Equity regards as done that which ought to be done. And therefore, if the mortgagor, having so covenanted, fails to make the policy of insurance payable to the mortgagee, or to assign the same, before or after loss, the fund arising therefrom is clearly within the operation of the fundamental

maxim just quoted, because the mortgagor was bound to so fulfill his promise to the mortgagor as that funds arising from insurance effected by the mortgagor should belong to the mortgagee, at least to the extent of his, the mortgagee's, interest in the property insured. This promise, or executory contract, equity will enforce, by impressing such funds with a lien in favor of the mortgagee, whether in the hands of the mortgagor, his heirs, executors or administrators, the insurance company, or voluntary assignees of said funds, or purchasers, or encumbrances thereof, with notice. Walker *vs.* Brown, 165 U. S., 654, 664. Pomeroy's Eq. Jur., vol. 3, sec. 1233."

Judge Gray denies that any lien upon any such insurance money exists in favor of the mortgagee because, as he says, there is no contract between the grantee and the mortgagee to insure for its benefit, and there is a consequent lack of "the first essential requisite to an equitable lien."

We are not under this head discussing the right of the trustee. What we are for the moment contending for is, that there is a right of equitable lien in favor of the mortgagor, reserving the duty of establishing a derivative right to this lien in favor of the Trustee, for discussion under the next proposition.

The learned Judge thought the appellant rested its claim upon an assertion of a direct right, as between it and the grantee, when, in point of fact, it rested it upon the assertion of (1) a right as against the grantee on the part of the mortgagor, and (2) a right against the fund derived by equitable principles, through that of the mortgagor.

We fail to discriminate qua a fund raised under insurance against fire, the case of a mortgagor which has charged upon its grantee the duty of performing its covenant to insure, in the mortgage contained, and the case of a mortgage as against the mortgagor, where the latter has remained the owner of the premises.

It being conceded that if the latter effects insurance, the mortgagee is entitled to a lien upon the insurance moneys because of the covenant to insure, why does not a lien attach upon these moneys under like circumstances, *qua* the mortgagor, where it has charged upon its grantee the performance of the duty?

Assume the case of a mortgage to secure a debt of the mortgagor for which it is personally liable; a covenant to insure contained therein; a conveyance to the grantee subject to the mortgage; insurance effected in the name of the grantee; a destruction by fire; a payment of insurance moneys; and a collection of the mortgage debt from the mortgagor. Under these circumstances, would not the mortgagor be entitled to a lien, by way of indemnity, upon the insurance moneys? As between mortgagor and grantee it was the duty of the latter to insure. It did insure; the moneys in hand are properly applicable to cover performance of the covenants.

The case we have put differs from the one before the Court only in the fact that there is no personal liability on the part of the mortgagor to pay the mortgage debt; but as we have shown, there is a liability for breach of the covenant to insure.

Under the principle conceded by Judge Gray, that "if the mortgagor, having so covenanted, fails to make the policy of insurance payable to the mortgagee or to assign the same before or after loss, the fund arising therefrom is clearly within the operation of the fundamental maxim," why is not the grantee, who has covenanted with the mortgagor that insurance shall be effected, liable in case of loss, to have the insurance fund subjected to a lien because of the duty to indemnify?

It was the duty of the grantee, *qua* the mortgagor, to insure. It did insure. The fund is in court. Can we conceive that a court of equity,

under such circumstances, would compel a mortgagor entitled to indemnity, to sue a grantee, possibly irresponsible, where it had under its control a fund resulting from the doing of what the grantee was compelled to do?

IV.—The fund raised by the insurance, thus impressed with the duty of indemnity of the mortgagor, is collateral security for the performance by mortgagor of its duty to insure and, as such, inures to the benefit of the trustee.

In *Keller* vs. *Ashford*, 133 U. S., 610, the syllabus reads thus:

"An agreement in a deed of real estate, by which the grantee assumes the payment of a mortgage made by the grantor, is a contract between the grantee and the mortgagor only; and does not, unless assented to by the mortgagee, create any direct obligation, at law or in equity, from the grantee to the mortgagee. But the mortgagee may avail himself in equity of the right of the mortgagor against the grantee. And if the mortgagee, after the land has been sold under a prior mortgage for a sum insufficient to pay that mortgage, and after he has recovered a personal judgment against the mortgagor, execution upon which has been returned unsatisfied, brings a suit in equity against the grantee alone, and the omission to make the mortgagor a party is not objected to at the hearing, it affords no ground for refusing relief."

In the opinion of the Court, delivered by Mr. Justice GRAY, the whole subject of the right of a creditor to the benefit of all securities given by the principal to the surety for the payment of the debt is discussed, with exhaustive learning and presentation. It is said:

"In the case at bar, the promise of Ashford was to Thompson and not to the mortagees, and there

was no privity of contract between them and Ashford. The consideration of the promise moved from Thompson alone. The only object of the promise was to benefit him, and not to benefit the mortgagees or other incumbrances; and they did not know of or assent to the promise at the time it was made, nor afterwards do or omit any act on the faith of it. It is clear, therefore, that Thompson only could maintain an action at law upon that promise.

"In equity, as at law, the contract of the purchaser to pay the mortgage, being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee. *Parsons* v. *Freeman*, 2 P. Wms., 664, note; *S. C.* Ambler, 115; *Oxford* v. *Rodney*, 14 Ves. 417, 424; *In re Empress Engineering Co.*, 16 Ch. D., 125; *Gandy* v. *Gandy*, 30 Ch. D., 57, 67.

"But it has been held by many State Courts of high authority in accordance with the suggestion of Lord Hardwicke in *Parsons* v. *Freeman*, Ambler, 116, that in a Court of equity the mortgagee may avail himself of the right of the mortgagor against the purchaser.

"This result has been obtained by a development and application of the ancient and familiar doctrine in equity that a creditor shall have the benefit of any obligation or security given by the principal to the surety for the payment of the debt. *Maure* v. *Harrison*, 1 Eq. Cas., Ab. 93; pl. 5; Bac. ab Surety, D. 4; *Wright* v. *Morley*, 11 Ves., 12, 22; *Phillips* v. *Thompson*, 2 Johns, Ch. 418; *Curtis* v. *Tyler*, 9 Paige, 442, 435; *New Bedford Institution for Savings* v. *Fairhaven Bank*, 9 Allen, 175; *Gampton* v. *Phipps*, 108 U. S., 260, 263.

"In *Hampton* v. *Phipps*, just cited, this Court declared the doctrine to be well settled, and applicable 'equally between sureties, so that securities placed by the principal in the hands of one, to operate as an indemnity by payment of the debt, shall inure to the benefit of all;' and declined to apply the doctrine to the case before it, because the mortgage in question was given by one surety to another merely to indemnify him against being compelled to pay a greater share of the debt than the sureties had agreed between themselves that he

should bear, and he had not been compelled to pay a greater share.

"The doctrine of a right of a creditor to the benefit of all securities given by the principal to the surety for the payment of the debt does not rest upon any liability of the principal to the creditor, or upon any peculiar relation of the surety towards the creditor; but upon the ground that the surety, being the creditor's debtor, and in fact occupying the relation of surety to another person, has received from that person an obligation or security for the payment of the debt, which a Court of equity will therefore compel to be applied to that purpose at the suit of the creditor. Where the person ultimately held liable is himself a debtor to the creditor, the relief awarded has no reference to that fact, but is grounded wholly on the right of the creditor to avail himself of the right of the surety against the principal. If the person, who is admitted to be the creditor's debtor stands at the time of receiving the security, in the relation of surety to the person from whom he receives it, it is quite immaterial whether that person is or ever has been a debtor of the principal creditor, or whether the relation of suretyship or the indemnity to the surety existed, or was known to the creditor, when the debt was contracted. In short, if one person agrees with another to be primarily liable for a debt due from that other to a third person, so that as between the parties to the agreement the first is the principal and the second the surety, the creditor of such surety is entitled, in equity, to be substituted in his place for the purpose of compelling such principal to pay the debt.

"It is in accordance with the doctrine, thus understood, that the Court of Chancery of New York, the Court of Chancery and the Court of Errors of New Jersey, and the Supreme Court of Michigan have held a mortgagee to be entitled to avail himself of an agreement in a deed of conveyance from the mortgagor by which the grantee promises to pay the mortgage. *Halsey* v. *Reed*, 9 Paige, 446, 452; *King* v. *Whitely*, 10 Paige, 465; *Blyer* v. *Monholland*, 2 Sandf. Ch., 478; *Klapworth* v. *Dressler*, 2 Beasley, 62; *Hoy* v. *Bramhall*, 4 C. E. Green, 74, 563; *Crowell* v. *Currier*,

12 C. E. Green, 152; *S. C.* on appeal *nom. Crowell* v. *St. Barnabas Hospital*, 12 C. E. Green, 650; *Arnaud* v. *Grigg*, 2 Stew. Eq., 482; *Youngs* v. *Trustees of Public Schools*, 4 Stew. Eq., 290; *Crawford* v. *Edwards*, 33 Michigan, 354, 360; *Miller* v. *Thompson*, 34 Michigan, 10; *Higman* v. *Stewart*, 38 Michigan, 513, 523; *Hicks* v. *McGarry*, 38 Michigan, 667; *Booth* v. *Connecticut Ins. Co.*, 43 Michigan, 299. See also *Pardee* v. *Treat*, 82 N. Y., 385, 387; *Coffin* v. *Adams*, 131 Mass., 133, 137; *Biddel* v. *Brizzolara*, 64 California, 354; *George* v. *Andrews*, 60 Maryland, 26; *Osborne* v. *Cabell*, 77 Virginia, 462.

"The grounds and limits of the doctrine, as applied to such a case, has been well stated by Mr. Justice DEPUE delivering the unanimous judgment of the Court of Errors of New Jersey, in *Crowell* v. *St. Barnabas Hospital*, as follows:

"'The right of a mortgagee to enforce payment of the mortgage debt, either in whole or in part, against the grantee of the mortgagor, does not rest upon any contract of the grantee with him, or with the mortgagor for his benefit.

"'The purchaser of lands subject to mortgage, who assumes and agrees to pay the mortgage debt, becomes, as between himself and his vendor, the principal debtor, and the liability of the vendor, as between the parties, is that of surety. If the vendor pays the mortgage debt, he may sue the vendee at law for the moneys paid.

"'In equity, a creditor may have the benefit of all collateral obligations for the payment of the debt, which a person standing in the situation of a surety for others holds for his indemnity. It is in the application of this principle that decrees for deficiency in foreclosure suits have been made against subsequent purchasers, who have assumed the payment of the mortgage debt, and thereby become principal debtors as between themselves and their grantors."

"'But the right of the mortgagee to this remedy does not result from any fixed or vested right in him, arising either from the acceptance by the subsequent purchaser of the conveyance of the mortgaged premises, or from the obligation of the grantee to pay the mortgage debt as between himself and his grantor. Though the assumption of

the mortgage debt by the subsequent purchaser is absolute and unqualified in the deed of conveyance, it will be controlled by a collateral contract made between him and his grantor, which is not embodied in the deed. And it will not in any case be available to the mortgagee, unless the grantor was himself personally liable for the payment of the mortgage debt.

"'Recovery of the deficiency after sale of the mortgaged premises, against a subsequent purchaser, is adjudged in a Court of equity to a mortgage not in virtue of any original equity residing in him. He is allowed, by a mere rule of procedure, to go directly as a creditor against the person ultimately liable, in order to avoid circuity of action and save the mortgagor, as the intermediate party from being harrassed for the payment of the debt, and then driven to seek relief over against the person who has indemnified him, and upon whom the liability will ultimately fall. The equity upon which his relief depends is the right of the mortgagor against the vendee, to which he is permitted to succeed by substituting himself in the place of the mortgagor' (12 C. E. Green, 655, 656).

"The decisions of this Court, cited for the defendant, are not only quite consistent with this conclusion, but strongly tend to define the true position of a mortgagee who has in no way acted on the faith of, or otherwise made himself a party to, the agreement of the mortgagor's grantee to pay the mortgage; holding, on the one hand that such a mortgagee has no greater right than the mortgagor has against the grantee, and therefore cannot object to the striking out by a Court of Equity, or to the release by the mortgagor, of such an agreement when inserted in the deed by mistake. *Elliott* v. *Sackett*, 108 U. S., 132; *Drury* v. *Hayden*, 111 U. S., 223; and, on the other hand, that such an agreement does not, without the mortgagee's assent, put the grantee and the mortgagor in the relation of principal and surety towards the mortgagee, so that the latter, by giving time to the grantee, will discharge the mortgagor. *Shepherd* v. *May*, 115 U. S., 505,511."

In *Anthony* vs. *Glucose Company*, 146 N. Y., 407, the syllabus reads:

"A new corporation having been organized by the transfer to it of the property and business of certain original corporations, upon an agreement between the corporators of all of them that payment for the transfer should be made by apportioning to the original stockholders the whole of the stock of the new corporation not reserved for the use of the treasury, certain stockholders in one of the original corporations brought an action against the new corporation for a delivery of its stock to them. *Held*, that the action was maintainable against the new corporation, and that such stockholders were not to be turned over for relief to their own original corporation after by agreement all its functions had ceased, although it might not be wholly dead, it appearing that the new corporation owed a contract duty directly to the individual corporators and not to their corporate entities."

The mortgagor owed to the Trustee a duty to insure. It turned over to the grantee the performance of this duty. The grantee insured and, by reason of the insurance which it was its duty to effect, a fund was raised which was in the possession of the Court. Upon this fund, as we have endeavored to show, because of its right to indemnity, the mortgagor had a lien. This was collateral security for performance of the covenant. It inured, under thoroughly well settled equitable principles, derivately through the mortgagor, to the benefit of the Trustee.

The mortgagor would not have been permitted to dispose of this lien because of the equitable right of the Trustee.

It is conceded that if the property had not changed hands and if the insurance money had been in court, it would have been subject to an equitable lien in favor of the Trustee, because it had resulted from the performance of a duty. In the present case the mortgagor imposed the duty upon its grantee. The fund raised was charged with the duty and because thereof became impressed with a lien which the Trustee could enforce.

By the mortgage itself, as we have seen, there was a grant of "all and singular all the other property, real and personal or mixed, of every description whatsoever, belonging to or which may hereafter be acquired by such party of the first part, situate on, or appurtenant to, above described premises." It is not difficult to hold the insurance moneys to be personal property "appurtenant" to the mortgaged premises.

There is also a covenant, in Article Sixth, to assign, from time to time, "all other property and things whatsoever appurtenant thereto, whether now acquired and held or hereafter to be acquired."

In this connection Judge GRAY said:

"But the property or 'estate' which came to the hands or the appellant, as grantee of the equity of redemption, was the mortgaged premises, subject to the mortgage. There is no difficulty in determining what that estate is to be charged with. The court, here, however, is asked to press a lien in favor of the mortgagee, not on this estate, but upon funds which were never in any sense the property of the mortgagor, and could never have been the subject matter of a promise on its part."

We have endeavored to show that the fund upon which a lien is sought to be impressed, is one upon which the mortgagor had a lien which inured to to the benefit of the trustee.

Judge GRAY further says:

"It is hard, under these circumstances, to see that these particular funds were any more subject to a lien in favor of complainant than funds of the defendants on deposit with its bankers, or moneys coming to it from any other source. Equity will, under some circumstances, enforce the performance of a contract, or of a duty growing out of a contract, through the indirect methods of the recognition of an equitable lien or assignment, but it will not in the absence of fraud

create the duty or obligation independently of a contract, expressed intent or will, at some time entered into or declared by the party sought to be charged."

Of course there would have been no lien in favor of the mortgagor, and "*a fortiori*," there would have been no lien, derivative or otherwise, in favor of the Trustee, upon the general funds of the grantee. The fund upon which the lien was asserted, was one which would have resulted if a covenant had been performed. It stood in lieu and place of performance.

V.—The obligation entered into by Kann and Wertheimer, whilst they were acting for the benefit of the Penn Plate Glass Company, of which benefit the latter took advantage, imposed upon the latter the duty to apply the insurance money in payment of the mortgage bonds.

As the result of the proceedings for the appointment of a receiver in the court below, it was agreed by all concerned that a bond should be given covering the matter of insurance. Whilst this bond was given by the President of the Company and by its principal stockholder, in their individual capacities, it was so given with the full knowledge of the appellee and for its benefit. It is bound, in equity, having received the benefit which resulted therefrom, to abide performance.

In this bond it is covenanted :

"That in the event of a loss by fire of the property described in the said Pennsylvania Plate Glass Company mortgage, that then there shall be paid out to the said Farmers' Loan and Trust Company, trustee, in trust for the holders of valid bonds secured by the said mortgage, a sum equal to the double amount of such valid bonds, out of policies

of insurance existing in favor of the Penn Plate Glass Company.

Provided, that it shall have been finally adjudicated that the Penn Plate Glass Company, the present owner of the said proporty, is bound or liable by anything contained in the said mortgage or the terms of its purchase of the described mortgaged premises, to keep and maintain insurance for the benefit of the holders of bonds secured by the said mortgage."

Under this head we claim if, by virtue of the deed to it, it became the duty of the grantee to insure, that by virtue of the terms of the covenant we have just quoted, the insurance money inured to the benefit of the trustee.

We contend that this covenant imposed upon the Plate Glass Company the duty to appropriate the insurance moneys, in case of fire, if there was any duty upon it to insure, however the same arose.

We have endeavored to show, and will not repeat our argument to that effect, that by virtue of its assumption of the mortgage, at least in favor of the mortgagor, it became the duty of the grantee to perform the mortgagor's covenant to insure, upon demand.

It will be observed that the insurance moneys are to be applied for the benefit of the mortgage bondholders if "the present owner of the said property is bound or liable, not 'merely by anything contained in the said mortgage;' but by virtue of the 'terms of its purchase of the described mortgaged premises,' to keep and maintain insurance for the benefit, etc."

The mortgagor was bound to keep and maintain insurance for the benefit of the bondholders. It charged the duty to keep and to maintain such insurance for the benefit of said holders upon the grantee. It matters not that the Trustee could not sue the grantee upon the assumption. The duty

existed, because of a consideration which moved from the mortgagor. The proviso to the covenant was, not that the duty should exist by reason of anything contained in the mortgage alone; but also by virtue "of the terms of its purchase of the described mortgaged premises."

We therefore submit that it is not necessary for the appellant to do more than to prove that the mortgagor, by the terms of its deed to the grantee, had obliged the latter to keep and maintain insurance for the benefit of the holders of bonds in order that it might be indemnified

VI.—The retention of possession by the Penn Plate Glass Company, after default and after application for a Receiver, gave to the Trustee an interest in the insurance money.

This proposition has been very elaborately discussed in the earlier part of the brief, and it would be a waste of time to extend the discussion.

A default had occurred which, under the terms of the mortgage, entitled the Trustee to enter upon possession of the premises, to hold, use and operate the same, to conduct the business thereof, and enjoy the franchises pertaining thereto, and "to collect and receive all incomes, rents, issues and profits of the same and every part thereof."

Under such possession the Trustee would have been entitled to a just allowance for all disbursements and expenses, advances or liabilities made or incurred by it.

After demand that its right to enter upon possession should be recognized, the appellee remained in possession and appropriated to itself the rents, incomes, issues and profits which would have been applicable in the hands of the Trustee to payment for insurance and all other expenses.

It was the duty of the appellee, which thus

improperly retained possession and appropriated to itself the funds to which the Trustee was entitled, to make such appropriation of the same as would have been made by the Trustee.

In this connection we must not lose sight of the fact that the bond to which we have last referred was given for the purpose of retaining the possession, which enabled the appellee to deprive the Trustee of the revenues which would have enabled it to insure.

The decree of the Circuit Court of Appeals should be reversed and the case remanded to the Circuit Court for the Western District of Pennsylvania, with directions to execute its original decree.

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